Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL J. O'MALLEY,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an action by the FDIC to recover on a loan guarantee, 12 U.S.C. § 1823(3) and the *D'Oench* doctrine bar an innocent defendant from asserting a valid written release executed by a bank and issued to the defendant over four years prior to the FDIC's takeover of the bank.

2. Whether, in an action by the FDIC to recover on a loan guarantee, 12 U.S.C. § 1823(e) and the *D'Oench* doctrine bar an innocent defendant from asserting the defense of legal insufficiency, i.e, that essential elements of a contract—mutual agreement and consideration—were missing, thus rendering the guarantee void.

3. Whether, in an action by the FDIC to recover on a loan guarantee, 12 U.S.C. § 1823(e) and the *D'Oench* doctrine bar an innocent defendant from asserting the defenses of release and cancellation where such defenses arise out of the express language of the guarantee.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
Summary of Argument	8
1. O'Malley's defense of release where such release was in writing, signed by the Bank, and executed four years prior to the FDIC's takeover was not barred by 12 U.S.C. § 1823(e)	11
2. O'Malley's defense of legal insufficiency was not based on any side agreement but on the fact that two of the essential elements of a contract—mutual agreement and consideration—were missing from the guarantee, rendering the guarantee entirely void from the outset and, therefore, outside the scope of 12 U.S.C. § 1823(e)	13
3. O'Malley's defenses of release and cancellation arose out of the language of the guarantee and were, therefore, not barred by 12 U.S.C. § 1823(e)	16
4. A literal interpretation of Section 1823(e) makes compliance with such statute impossible insofar as releases are concerned	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: PAGE

Armstrong v. Resolution Trust Corporation, 157 Ill.2d 49 (1993) 8, 13, 15
Commerce Federal Savings Bank v. FDIC, 872 F.2d 1240 (6th Cir. 1989) ..... *passim*
D'Oench Duhne & Co. v. FDIC, 315 U.S. 447 (1942) 16
FDIC v. Blue Rock Shopping Center, Inc., 766 F.2d 744 (3rd Cir. 1985) 15
FDIC v. Maris, 121 Ill.App.3d 894, 460 N.E.2d 367 (1st Dist. 1984) 8
FDIC v. McFarland, 33 F.3d 532 (5th Cir. 1994) . 9, 20
FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974) 8, 16
FDIC v. Merchants Nat'l Bank of Mobile, 725 F.2d 634 (11th Cir. 1984) 15
FDIC v. Nemecek, 641 F.Supp. 740 (D. Kan. 1986) . ..... *passim*
FDIC v. Panelfab Puerto Rico, 739 F.2d 26 (1st Cir. 1984) 17, 18
FDIC v. Prann, 694 F.Supp. 1027 (D.P.R. 1988) . 12, 15
FDIC v. Venture Contractors, Inc., 825 F.2d 143 (7th Cir. 1987) 15, 16
Grubb v. FDIC, 868 F.2d 1151 (10th Cir. 1989) .. 10
Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981) ..... *passim*
Langley v. FDIC, 484 U.S. 86 (1987) 8, 9, 16
Riverside Park Realty Co. v. FDIC, 465 F.Supp. 305 (M.D. Tenn. 1978) 17

STATUTES:

12 U.S.C. § 1823(e) ..... *passim*
28 U.S.C. § 1257(a) 2

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael J. O'Malley ("O'Malley"), seeks a writ of certiorari to review an opinion and order of the Supreme Court of Illinois.

OPINIONS BELOW

The order denying O'Malley's Petition for Rehearing was entered by the Supreme Court of Illinois on December 5, 1994 and is reprinted at Appendix ("App.") 30. The October 27, 1994 opinion of the Supreme Court of Illinois is reported at 163 Ill.2d 130, 643 N.E.2d 825 (1994) and is reprinted at App. 1-29. The opinion of the Appellate Court of Illinois for the First District is reprinted at App. 31-69 and is reported at 249 Ill.App.3d 340, 188 Ill.Dec. 248, 618 N.E.2d 818 (1st Dist. 1993).

JURISDICTION

The Supreme Court of Illinois issued its opinion on October 27, 1994. App. 1-29. The Supreme Court of Illinois denied a timely petition for rehearing on December 5, 1994. App. 30. This petition for a writ of certiorari is being docketed in this Court within 90 days from the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The case involves the interpretation of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e), which provides:

> "No agreement which tends to diminish or defeat the right, title or interest of the Federal Deposit Insurance Corporation in any asset acquired by it under this Section either as security for a loan or by purchase shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously from the time of its execution an official record of the bank."

STATEMENT OF THE CASE

This case involves an action by plaintiff, the Federal Deposit Insurance Corporation ("FDIC"), to enforce a guarantee signed by defendant, Michael J. O'Malley. The guarantee was found in the files of the First National Bank of Oak Lawn, Illinois ("the Bank") after the Bank failed and the FDIC took control of the Bank's assets. At trial, O'Malley argued that the guarantee was void from the outset or, in the alternative, had been extinguished by the Bank before the FDIC acquired the Bank's assets. The Circuit Court of Cook County, Illinois found, as a matter of law, that these defenses were barred by 12 U.S.C. § 1823(e) (1988). The Circuit Court therefore ruled in favor of the FDIC, and the Illinois Appellate Court affirmed. (249 Ill.App.3d 340.) O'Malley was granted leave to appeal to the Illinois Supreme Court which affirmed the judgment of the Appellate Court over a dissent by Chief Justice Bilandic who contended that O'Malley's obligation to the Bank had been extinguished prior to the FDIC takeover and that 12 U.S.C. § 1823(e) did not apply.

In 1975 O'Malley and Wayne J. Bekta were business partners in various real estate transactions and developments. O'Malley and Bekta were also directors of the Bank. In 1975, O'Malley and Bekta became interested in developing a piece of real estate in Country Club Hills, Illinois. Dennis Dine, an experienced real estate developer and a long standing customer of the Bank, also participated in the transaction. It was agreed that Dine would borrow money, purchase the property, and take title to the property. When the property was developed or sold, all three parties would profit.

Bekta and O'Malley agreed that if Dine could not get a loan from the Bank for the $225,000 purchase price, they

would supply their personal guarantees as security. Sometime prior to February 28, 1975, Bekta and O'Malley signed a guarantee in Bekta's car while the two were making an inspection of their business properties. O'Malley left the guarantee with Bekta.

On February 28, 1975, Dine secured the loan for $225,000. According to O'Malley, the guarantee was not used in connection with the loan because the property in Country Club Hills was appraised for loan purposes at $420,000, nearly twice the amount of the purchase price. O'Malley testified that he did not know how the guarantee got into the Bank file. At the time of trial, Bekta was deceased. Dine also testified with respect to O'Malley's guarantee and supported O'Malley's testimony. He stated that he was unaware that Bekta or O'Malley had guaranteed the loan. The first time he became aware of any such guarantee was during his deposition.

John Geary was the loan officer who personally handled and approved the $225,000 loan to Dine on February 28, 1975. Geary was also president of the Bank. At trial, Geary testified that the only collateral required for the Dine loan was the Country Club Hills property which had been appraised at $420,000 and would therefore adequately serve as collateral for a loan of $225,000. Geary testified that the Dine loan was not made on the basis of any guarantee signed by Bekta or O'Malley. He further testified that he first saw the guarantee during his discovery deposition before trial.

O'Malley offered bank records into evidence. No reference to a guarantee was found in the loan proposal prepared by Geary in 1975, the collateral checklist, or a collateral audit report. Other bank records also did not refer

to the guarantee.[1] All of the above records were in existence and included among the Bank's official records when the FDIC took over the Bank in 1983. Thus, the FDIC had ample notice from these records that the Dine loans were not subject to any guarantee.

Moreover, Geary testified that in all cases where a guarantee is required with respect to a loan, a copy of a receipt of the guarantee is retained in the collateral register kept by the Bank. However, no collateral receipt existed with respect to the guarantee in this case. Furthermore, FDIC examiner, Greg Adamonis, testified that he found no mention of the guarantee in the thousands of Bank documents he examined.

In April of 1981, the Bank sold the two 1981 Dine notes to the LaSalle National Bank. The sale was approved by Geary. The vice president of the commercial lending department at LaSalle National Bank testified that he was unable to locate any document among LaSalle's records that would indicate that a guarantee formed a part of the collateral or documentation for the Dine loans which were purchased by the LaSalle National Bank. LaSalle National Bank later sold the notes back to the Bank.

In 1979, four years after the loan was made to Dine and four years before the FDIC takeover, O'Malley ended

[1] A memorandum to the credit file dated July 18, 1977 makes no mention of any guarantee despite the fact that Dine's note was apparently overdue at that time. Similarly, another memorandum to the credit file dated February 28, 1975 does not reflect any guarantee for the Dine's loans. Also, a summary report prepared sometime after April 19, 1990 containing information on all outstanding loans of Dine and Dennis Dine Inc. listed no guarantees collateral or as part of the documentation pertaining to the Dine loans.

his relationship with the Bank. He, therefore, sold his stock in the Bank and resigned as a director. He had no further dealings with the Bank after that date.

John Geary corroborated O'Malley's testimony. Geary testified that in 1979, O'Malley sold his stock in the Bank and terminated his business relationships with the Bank. This was part of an arm's length transaction and both sides were represented by counsel. At that time Geary, as president of the Bank, gave O'Malley a written release releasing him from any and all obligations he owed to the Bank, including guarantees. The release was witnessed by the vice president of the Bank, Nancy Adams. In return, Geary demanded and received from O'Malley a written release, releasing the Bank from any obligations it owed to O'Malley. At the time, Geary had the requisite authority to release guarantees to the same extent that he was authorized to approve loans. Geary's lending authority for secured loans was then between $350,000 and $750,000, well in excess of the amount of the guarantee. Geary testified that the releases were placed in the Bank files. Geary did not give the guarantee back to O'Malley, nor did O'Malley request it, because they did not know that it was among the Bank's records.

Greg Adamonis, an FDIC examiner, testified that he did not find any releases in his examination of the Bank's records. However, Adamonis also testified that there were approximately 500 boxes of bank documents in the possession of the FDIC and that he had not personally inspected all of them. Among the files Adamonis did not inspect were O'Malley's files, Bekta's files and the Bank's corporate files.

The FDIC did find two outstanding and unpaid notes signed by Dine. The FDIC sought repayment from Dine

but Dine filed bankruptcy. In September 1983, the FDIC demanded payment from O'Malley under the guarantee. O'Malley refused and the FDIC brought this action. O'Malley filed an Answer asserting the release he received from the Bank in 1979.

In its Reply to O'Malley's Answer, which the FDIC filed in 1984, the FDIC did not attack the validity of the release. Not until October 1987, in a motion for summary judgment, did the FDIC assert for the first time that O'Malley was precluded from asserting the release based upon 12 U.S.C. § 1823(e).

When the FDIC disclosed its reliance on 12 U.S.C. § 1823(e), O'Malley sought leave to have an expert, the accounting firm of Ernst & Whinney, conduct a document audit of the Bank's records to attempt to locate a copy of the release since one of the specific requirements of Section 1823(e) is that the release be an "official record of the Bank." O'Malley also sought the disclosure of the names of the FDIC "closing team" who participated in the closing of the bank. The trial court refused to grant O'Malley's request. Therefore, O'Malley was not in a position to rebut the testimony of the FDIC witnesses who testified they did not find the release in the Bank's records but who admittedly did not look for the release in several critical Bank files including O'Malley's, Bekta's and the Bank's corporate files.

Following a bench trial, the Circuit Court of Cook County, Illinois entered judgment in favor of the FDIC and against O'Malley finding that the guarantee executed by O'Malley guaranteed the Dine loans and that the FDIC was entitled to recover thereunder. The Circuit Court also ruled that 12 U.S.C. § 1823(e) barred O'Malley from asserting the release as a defense to the FDIC's claim on the guarantee. (See App. 73-75.)

O'Malley filed a post trial motion seeking a new trial which the trial court denied. O'Malley appealed to the Illinois Appellate Court which affirmed the trial court's decision. Presiding Illinois Appellate Court Justice Gordon dissented. O'Malley was granted leave to appeal to the Illinois Supreme Court which affirmed the judgment of the Appellate Court. Chief Justice Bilandic dissented as did Justice Harrison.

In his dissenting opinion, Chief Justice Bilandic characterized the majority's opinion as being "factually flawed by its erroneous application of Section 1823(e) to the facts of this case. O'Malley's guarantee was discharged by mutual releases exchanged between O'Malley and the Bank. The FDIC has no authority to enforce a non-existent guarantee."

REASONS FOR GRANTING THE WRIT

Summary of Argument

12 U.S.C. § 1823(e) was enacted to protect the FDIC from secret side agreements between an insolvent bank and a bank obligor, entered into at the time of the obligation and which, if given effect, would render the obligation illusory and unenforceable. *Langley v. FDIC*, 484 U.S. 86 (1987); *Armstrong v. Resolution Trust Corporation*, 157 Ill.2d 49 (1993). Section 1823(e) is primarily concerned with situations where a bank and the obligor have engaged in a "deceptive scheme or arrangement whereby the banking authority is likely to be misled." *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974); *FDIC v. Maris*, 121 Ill.App.3d 894, 460 N.E.2d 367 (1st Dist. 1984).

Section 1823(e) was never intended to prevent an innocent party from asserting the obligation's legal insufficiency (distinct from any side agreement) or a subsequent valid release or cancellation, particularly where the release or

cancellation is contemplated by the express language of the obligation, itself.

The last time the United States Supreme Court considered 12 U.S.C. § 1823(e) was in 1987 when it decided the *Langley* case. Since that time, there have been a large number of bank failures in this country. This, in turn, has produced a multitude of FDIC collection and foreclosure actions involving the application of 12 U.S.C. § 1823(e) to the various defenses raised in those cases.

Many of the cases interpreting 12 U.S.C. § 1823(e) are simply irreconcilable. One line of cases have permitted defendants to assert releases to show that the FDIC did not "acquire an asset" because it had been extinguished prior to the FDIC takeover. This is the so-called "no asset" exception to 12 U.S.C. § 1823(e). (See *FDIC v. McFarland*, 33 F.3d 532 (5th Cir. 1994); *Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240 (6th Cir. 1989); *FDIC v. Nemecek*, 641 F.Supp. 740 (D. Kan. 1986).)[2] Other cases have allowed defenses to be asserted which arise out of language contained in the very instrument that the FDIC seeks to enforce. (See, *Howell v. Continental Credit Corp.*, 655 F.2d 742 (7th Cir. 1981.) *Langley*, itself, suggested that "real defenses" that show that the instrument

[2] In *Commerce* and *Nemecek* the releases were not in the banks' files. In *McFarland*, the release was part of the bank's records but not signed by the guarantor or reflected in the loan committee's minutes. Also in *McFarland*, other than the guarantee, there was no evidence in the bank's records that the subject loan was secured by a guarantee. That is the same situation in this case. Moreover, here, the FDIC did not make a thorough search of the Bank's records to see if it could locate the release and O'Malley was prohibited from doing so by the trial court. Thus, it is unfair to assume that the release was not in O'Malley's file at the Bank which the FDIC never checked.

was entirely void from the outset may be asserted, notwithstanding 12 U.S.C. § 1823(e).

In the instant case, the Illinois Supreme Court expressly acknowledged the conflict among the federal courts regarding the application of 12 U.S.C. § 1823(e):

> O'Malley also relies on *Federal Deposit Insurance Corp. v. Nemecek*, 641 F.Supp. 740 (D. Kan. 1986), to support his "no-asset" argument. In *Nemecek*, the court allowed the defendants to introduce an oral accord and satisfaction against the FDIC. In that case, the court held that an oral accord and satisfaction extinguished a note before the FDIC took control of a bank, so Section 1823(e) did not apply. O'Malley argues that the same reasoning should apply to his release agreement.
>
> We note that the reasoning in *Nemecek* has been criticized by other courts. (*Federal Deposit Insurance Corp. v. National Consumer Alliance, Inc.*, 1994 WL 326064 D. an. 1994), (noting that *Nemecek* was decided before the Supreme Court's narrow construction of Section 1823(e) in *Langley*); *Cimarron Federal Savings & Loan Association v. McKnight*, 840 P.2d 648 (Okla. App. 1992); *Cover*, 714 F.Supp. 455.) In *Cover*, the court stated that to adopt the logic of *Nemecek* "would destroy the effect and protection of § 1823(e) and hamper the FDIC's ability to follow the purchase and assumption alternative by injecting uncertainty into the valuation of assets." (*Cover*, 714 F.Supp. 458.) In addition, the *Nemecek* reasoning is inconsistent with the reasoning of other courts that have addressed O'Malley's "no-asset" argument. We therefore decline to follow *Nemecek*.

However, other cases have followed *Nemecek* including the case of *Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240 (6th Cir. 1989) which Chief Justice Bilandic regarded as controlling in this case. (Also see, *Grubb v. FDIC*, 868 F.2d 1151 (10th Cir. 1989).)

Thus, this case presents an issue of great public importance at a time of frequent bank failures, viz., whether a defendant may assert a valid release obtained from a bank in a subsequent action by the FDIC to recover a loan or is he barred from doing so under 12 U.S.C. § 1823(e). If *FDIC v. Nemecek*, 641 F.Supp. 740 (D. Kan. 1986) and the cases which recognize the "no asset" exception to 12 U.S.C. § 1823(e) are correct on this issue, then the instant case presents a perfect opportunity for this Court to say so, settle the issue, once and for all, and resolve the apparent confusion and conflict which currently exists concerning the applicability and scope of the "no asset" exception.

1. O'Malley's defense of release where such release was in writing, signed by the Bank, and executed four years prior to the FDIC's takeover was not barred by 12 U.S.C. § 1823(e).

Four years before the FDIC took over the Bank, O'Malley received a written release from the Bank, signed by its president, which released O'Malley from "any and all obligations owed to the bank," as of October 1, 1979. In consideration for this release, O'Malley also released the Bank from all liability. Thereafter, O'Malley had no further dealings with the Bank.

Everyone—the FDIC, the trial court, the Illinois Appellate Court, and the Illinois Supreme Court—conceded that the Bank's release to O'Malley was valid under common law principles. Thus, O'Malley's guarantee was no longer an asset of the Bank at the time of the FDIC takeover in 1983, having been extinguished as a bank asset—along with any and all other obligations O'Malley owed the Bank—at the time the release was given to O'Malley in 1979.

Thus, 12 U.S.C. § 1823(e) has no application to this case since such statute, by its very terms, only applies "to any asset acquired by" the FDIC by reason of an FDIC takeover. Previously extinguished assets are not covered by 12 U.S.C. § 1823(e). *FDIC v. Nemecek*, 641 F.Supp. 740 (D.Kan.1986), *Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240 (6th Cir. 1989),[3] and *FDIC v. Prann*, 694 F. Supp. 1027 (D.P.R. 1988).

This point was clearly spelled out in the *Nemecek* case where the court held that:

> this Court is convinced that Section 1823(e) has no application to this case. The Bank and the Defendants had reached an accord and satisfaction, a settlement of claims, prior to the Bank's closing. Therefore, when the FDIC purchased the Bank's assets it could not have purchased Defendant's note as it had previously been extinguished. Section 1823(e) applies only

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[3] In *Commerce*, an individual and a corporation owned real estate. The two borrowed $125,000 from a bank. As security for the loan, the borrowers executed a deed of trust which contained a clause covering future borrowings. The deed of trust also had a provision that the trust would be extinguished if all outstanding debts encumbering the instrument were paid.

The balance of the $125,000 was paid, and the bank orally agreed to release the deed of trust. Meanwhile the bank failed. The FDIC was appointed receiver. The FDIC acquired various assets of the failed bank, including the deed of trust and a second promissory note for $50,000 executed by the corporation. The FDIC refused to release the deed of trust, contending that the $50,000 obligation was secured by the deed of trust. The FDIC argued that the oral agreement to release the deed was barred by § 1823(e).

The Sixth Circuit rejected the FDIC's position in *Commerce* and held that the deed of trust was not an asset acquired by the FDIC. The court concluded that the original $125,000 indebtedness had been satisfied before the FDIC's purchase and that the oral agreement to release the trust deed was enforceable and not barred by § 1823(e).

to assets which the FDIC has acquired." *FDIC v. Nemecek*, *supra*, at 743.

The instant case presents an even more compelling case than *Nemecek* or *Commerce*. Here there was a *written* release. In *Nemecek* and *Commerce*, the accord and satisfaction and release were *oral* yet the courts in those cases allowed the releases to be asserted against the FDIC, notwithstanding 12 U.S.C. § 1823(e).

The unrebutted testimony in this case is that the release obtained by O'Malley from the Bank was in writing, signed by the Bank president and supported by valuable consideration (i.e. O'Malley's release of the Bank). These facts are sufficient to defeat any possible claim that the release was illusory in nature, thereby distinguishing this case from those involving a "hidden side agreement" which is the real concern of Section 1823(e). See *Armstrong v. Resolution Trust Corporation*, *supra*.

2. O'Malley's defense of legal insufficiency was not based on any side agreement but on the fact that two of the essential elements of a contract—mutual agreement and consideration—were missing from the guarantee, rendering the guarantee entirely void from the outset and, therefore, outside the scope of 12 U.S.C. § 1823(e).

The uncontroverted evidence in this case is that there was never any agreement among the Bank, Dine, and O'Malley to have O'Malley give a guarantee for Dine's loan; the O'Malley guarantee played no part, whatsoever, in the Dine loan transaction and, most certainly, did not serve as any part of the consideration for such loan; no consideration was given by the Bank for the O'Malley guarantee; and the Bank records which would customarily reflect a guarantee did not reflect any guarantee for the Dine loans and this was known by the FDIC.

In the face of this overwhelming evidence that O'Malley never guaranteed the Dine loans, the FDIC offered no rebuttal evidence whatsoever. Instead, the FDIC argued that, under 12 U.S.C. § 1823(e), O'Malley was prohibited from arguing that the guarantee was legally insufficient from the outset.

However, the FDIC's reliance on 12 U.S.C. § 1823(e) is misplaced. Nothing in Section 1823(e) prohibits O'Malley from litigating whether one or more of the essential elements of a contract are missing with respect to the guarantee. This is evident from the language of 1823(e) itself which provides, in pertinent part, as follows:

> *No agreement* which tends to diminish or defeat the right title, or interest of the [FDIC] in any asset acquired by it under this Section. . . . shall be valid against the Corporation unless such agreement . . . (Emphasis added.)

The clear language of Section 1823(e), as well as the case law interpreting such section, makes clear that it was designed merely to protect the FDIC from unrecorded "side agreements" but was never intended to foreclose a party from contesting the contractual validity of the underlying obligation. See, *Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240 (6th Cir. 1989).

In *Commerce*, the Court stated at 1245:

> "The purpose [of Section 1823(e)] is to protect the FDIC from hidden agreements which could defeat its interest in what is otherwise a facially valid note. Such hidden agreements would prevent the FDIC from accurately valuing assets and from making informed decisions on how best to handle the Bank's insolvency. The concern is thus with agreements that are not made part of the note. [citations omitted]

> In contrast, however, the statute "does not apply when . . . the parties contend that no asset exists . . . and that such invalidity is caused by acts independent of any understanding or side agreement." *Merchants Nat'l Bank of Mobile* 725 F.2d at 639 (emphasis in original); *Blue Rock Shopping Center, Inc.*, 766 F.2d 1262, 1267 (6th Cir. 1985) ("By its terms, [Section 1823(e)] protects the FDIC from unwritten agreements that otherwise might be asserted to diminish or defeat its rights in assets acquired from a failed bank. However, the claim asserted by [appellant] is not in the nature of an agreement."); compare *Federal Deposit Ins. Corp. v. Prann*, 694 F.Supp. 1027, 1037 (D. P.R. 1988) (Section 1823(e) is inapplicable to the present case because the debt which forms the basis of the asset claimed by FDIC was satisfied before FDIC acquired the bank's assets.") (emphasis in original)' *Federal Deposit Ins. Corp. v. Nemecek*, 641 F.Supp. 740, 743 (D. Kan. 1986) ("[W]hen the FDIC purchased the Bank's assets, it could not have purchased defendants' note, as it had been previously extinguished. Section 1823(e) applies only to assets which the FDIC has acquired.") (emphasis in original)' cf. *Federal Deposit Ins. Corp. v. Venture Contractors, Inc.*, 825 F.2d 143, 149 (7th Cir. 1987) (FDIC bound by limitations contained in the interest acquired under purchase and assumption agreement); *O'Neil*, 809 F.2d at 354 (Section 1823(e) is not implicated by a defense which "appeared in the asset itself."). (872 F.2d at 1245.)

See also *Armstrong v. Resolution Trust Corporation*, 157 Ill.2d 49 (1993) in which the Illinois Supreme Court also observed that the primary objective of Section 1823(e) was to protect against secret verbal side agreements.

O'Malley's attack on the guarantee is not based on a secret side agreement but on the legal insufficiency of the guarantee itself. This is a "real defense" which this Court

appeared to exempt from the scope of 12 U.S.C. § 1823(e) in *Langley v. FDIC*, 484 U.S. 86 (1988).

In this case at least two of the essential elements of a valid contract are missing with respect to the guarantee—there was no mutual agreement among the parties concerning the guarantee and there was no consideration given for the guarantee. Relative to these points, the evidence was irrefutable that the Bank made the loan to Dine without regard to and without any knowledge of the so-called O'Malley guarantee. Obviously, then, the loan to Dine was not made in consideration of O'Malley's guarantee. Thus, such purported guarantee must fall for want of mutual agreement and lack of consideration.

These defenses are "real defenses" that go to the very essence of the guarantee's contractual validity and in no way rely on any "side agreement" between O'Malley and the Bank to defeat the guarantee. Thus, they are not barred by Section 1823(e). (See, *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974) where the Ninth Circuit held that *D'Oench Duhne & Co. v. FDIC*, 315 U.S. 447 (1942)—which 12 U.S.C. § 1823(e) codified—did not preclude a defendant from asserting the affirmative defense of lack of consideration in an FDIC action to collect a promissory note; See also, *FDIC v. Venture Contractors, Inc.*, 825 F.2d 142 (7th Cir. 1987.)

3. O'Malley's defenses of release and cancellation arose out of the language of the guarantee and were, therefore, not barred by 12 U.S.C. § 1823(e).

Section 1823(e) does not apply where the defense raised appears in writing on the face of the instrument that the FDIC seeks to enforce. This rule was announced in the case of *Howell v. Continental Credit Corp.*, 655 F.2d 743

(7th Cir. 1981) where the Seventh Circuit permitted the defendant to raise certain contractual defenses which arose out of the very instrument that the FDIC was seeking to enforce. The Court in *Howell* stated as follows:

> The defense appellant posits here arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce. We have not been presented with any persuasive reason why appellant's defense should not at least be tested at trial.
>
> The details of exactly how Continental [the original lessor] was to acquire title and the remaining factual details of appellant's defense are flagged on the face of the instrument and are issues for trial . . . [t]he fact that the Court must go outside of the leases to test the strength and validity of the defenses is not fatal *where the foundation and basis of that defense is in a document arguably meeting the non-secrecy requirements of Section 1823(e).* (*Howell v. Continental Credit Corp.*, 655 F.2d at 748, emphasis supplied.)

Similar reasoning was also utilized in *Riverside Park Realty Co. v. FDIC*, 465 F.Supp. 305 (M.D. Tenn. 1978), where the Court in that case held that Section 1823(e) did not bar the raising of a separate agreement as a defense to the foreclosure of a deed in trust by the FDIC. The Court held in *Riverside* that since the terms of the deed in trust made reference to the loan agreement which the defendants claimed had been breached, Section 1823(e) did not apply.

The rule in the *Howell* case was also followed in *FDIC v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26 (1st Cir. 1984), a case involving facts very similar to those in the present case. In *Panelfab*, the FDIC filed suit against the defendants on a written guarantee of a $200,000 note. As in this case, the defendants in *Panelfab* claimed that the

guarantees had been canceled several years prior to the FDIC's takeover. The FDIC asserted that the cancellation of the guarantees was ineffective because the defendants had not complied with the provisions of Section 1823(e).

In *Panelfab*, there was nothing in the bank records to reflect that the cancellation of the guarantee agreements had been approved by the directors of the bank or its loan committee. Holding that the provisions of Section 1823(e) did not apply to invalidate the defendants' claims that the guarantee had been canceled, the Court of Appeals commented:

> The FDIC asserts that the cancellation of the letter of guarantee constitutes . . . the invocation of an agreement which tends to diminish or defeat the FDIC's right in this case. . . . Because the cancellation itself cannot be an agreement, the agreement to which the FDIC refers can only be the letter of guarantee which includes the clause outlining the means of a unilateral cancellation.
>
> Specifically, we will not consider the guarantee agreement as a whole to be valid for the purpose of collecting on the debt only to invalidate under 1823(e)(3) a particular option contained in the agreement that, when exercised according to its terms, is a defense to that collection. (*FDIC v. Panelfab Puerto Rico Inc.*, 739 F.2d at 30.

In the present case, the purported guarantee contains the following language:

> The bank may from time to time, without notice to the undersigned (or any of them), . . . (d) *release* or compromise any liability of any of the undersigned hereunder, or any liability of any other party or parties primarily or secondarily liable on any of the liabilities, . . . (Emphasis added.)

Thus, the "foundation and basis" of O'Malley's defense of release is derived from the very document which the FDIC seeks to enforce, i.e., the guarantee, and such defense is, therefore, not barred by Section 1823(e) under the *Howell* doctrine.

The guarantee document in this case also contained the following language:

> . . . any of the undersigned and any person duly authorized and acting on behalf of any of the undersigned, may give written notice to the bank of discontinuance of this guarantee as to the undersigned by whom or on whose behalf such notice is given . . . .

Therefore, the defense of "cancellation," which was raised by O'Malley, also has its "foundation and basis" in the guarantee document itself. Here, the exchange of releases between O'Malley and the Bank clearly constituted "written notice to the bank of discontinuance," as well as notice to the Bank that O'Malley was no longer a party to any guarantee. Since the document upon which the FDIC based its entire case, i.e., the guarantee, contained a provision by which O'Malley could—and *did*—cancel his guarantee, the FDIC should not have been permitted to invoke Section 1823(e) to bar either O'Malley's release or cancellation defense.

4. A literal interpretation of Section 1823(e) makes compliance with such statute impossible insofar as releases are concerned.

Under a literal interpretation of Section 1823(e), any release not executed "contemporaneously" with the execution and delivery of the guarantee is invalid under § 1823(e)(2). This interpretation is, of course, absurd since contemporaneous execution of a guarantee and a release

never occurs in the real world. The FDIC virtually conceded this point in the brief it submitted to the Illinois Supreme Court but it shrugged this off by saying that "harsh results" sometimes happen.

Unfortunately, under a literal interpretation of § 1823(e)(2), the FDIC can use the statute to invalidate any release it chooses (since few if any releases are executed contemporaneously with the obligation), including the release of a home mortgagor, a guarantor, or any other obligor of a bank, regardless of the legitimacy of the transaction. Surely this type of broad and arbitrary power was never intended by Congress, nor should it be permitted by this Court.

Also, under the FDIC's strict and literal interpretation of subsection (2) of § 1823(e), any release not signed by the "person or persons claiming an adverse interest thereunder, including the obligor. . ." would also be invalid. Since the person being released does not customarily sign the release document, this again results in an absurd situation where the FDIC can use § 1823(e)(2) to invalidate virtually any release it chooses. (The Court, in *McFarland, supra,* rejected this interpretation in a case where the defendant had not signed the release.)

CONCLUSION

Section 1823(e) protects the FDIC from secret side agreements between a defendant and a bank. Here, there was no secret side agreement with the Bank. The understanding that the guarantee would not be delivered to the Bank unless needed for the Dine loan, was strictly among O'Malley, Bekta, and Dine, in their individual capacities. The Bank knew nothing about this understanding—and certainly was not a party to it. It is uncontroverted that

the Bank made the loan to Dine without even knowing about the guarantee. It is also uncontroverted that the Bank released O'Malley from any and all claims, four years prior to the FDIC takeover. It is apparent from these uncontroverted facts that O'Malley does not seek to assert any secret side agreement he had with the Bank—there was none. Thus, Section 1823(e) is inapplicable and does not bar his defenses of release and legal insufficiency.

The opinion of the Supreme Court of Illinois in this case interpreting Section 1823(e) conflicts with the *Nemecek*, *Commerce*, *Howell*, and *McFarland* decisions. In view of the rising number of bank failures in this country and the resulting litigation by the FDIC, it is certain that lower courts will continue to be called upon to interpret Section 1823(e) in the future. Petitioner respectfully submits that certiorari should be granted in this case to resolve the conflict among the federal and state courts regarding the scope of Section 1823(e).

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Docket No. 76106—Agenda 19—May 1994,
FEDERAL DEPOSIT INSURANCE CORPORATION,
Appellee and Cross-Appellant, v. MICHAEL J.
O'MALLEY, Appellant and Cross-Appellee.

JUSTICE NICKELS delivered the opinion of the court:

This case involves an action by plaintiff, the Federal Deposit Insurance Corporation (FDIC), to enforce a guarantee signed by defendant, Michael J. O'Malley, in connection with a bank loan. The bank that made the loan subsequently failed. The FDIC then took control of the bank's assets and found the guarantee in the bank's files. At trial, O'Malley argued that the guarantee was invalid from the outset or, in the alternative, had been extinguished by the bank before the FDIC acquired the bank's assets. The circuit court found, as a matter of law, that these defenses were barred by 12 U.S.C. § 1823(e) (1988). The circuit court therefore ruled in favor of the FDIC, and the appellate court affirmed. (249 Ill. App. 3d 340.) For the following reasons, we affirm the judgment of the appellate court.

I. FACTS

The parties presented the following evidence at trial. In 1975, Michael J. O'Malley and Wayne J. Bekta were directors and shareholders of the First National Bank of Oak Lawn (the Bank). They had also worked together as business partners in past real estate transactions. In 1975, O'Malley and Bekta became interested in purchasing and developing a tract of real estate located in Country Club Hills, Illinois. At this time, O'Malley and Bekta were acquainted with Dennis Dine, whom they knew as a customer of the Bank and an experienced real estate developer.

They therefore approached him and asked him if he would participate in the purchase of the Country Club Hills property. Dine agreed. The three of them subsequently determined that Dine would apply for a loan from the Bank and purchase the property. Later, if the property showed a profit from development or sale, the three would split this profit.

When Dine applied for the loan, he submitted the property as collateral. Bekta and O'Malley decided that, if the Bank did not approve the loan, they would offer their personal guarantees as security. O'Malley and Bekta therefore signed a guarantee in the amount of $225,000, the purchase price of the Country Club Hills property. They did not wait to see if the Bank would approve the loan without this additional security.

At trial, O'Malley acknowledged signing the guarantee and conceded that he was generally aware of the legal effect of a guarantee. O'Malley stated that he left the signed guarantee with Bekta but that he was uncertain of what happened to the guarantee after that point. The guarantee and two promissory notes signed by Dine were later found in the Bank's files. At trial, O'Malley claimed that the guarantee was not intended to be used unless additional security was needed. Dine also testified with respect to O'Malley's guarantee and supported O'Malley's testimony. He stated that he was unaware that Bekta or O'Malley had guaranteed the loan. The first time he became aware of any such guarantee was during his deposition.

John Geary was the loan officer who handled and approved the loan to Dine in 1975. Geary was also president of the Bank. At trial, Geary testified that the only collateral required for the loan was the Country Club Hills property. The purchased property was appraised at $420,000 and would therefore adequately serve as collateral for a loan of

$225,000. Geary testified that he first saw the guarantee during a deposition before trial.

O'Malley offered bank records into evidence. No reference to a guarantee was found in the loan proposal, the collateral checklist, or a collateral audit report. Other bank records also did not refer to the guarantee. In addition, Paul Adamonis, an employee of the FDIC, testified that he found no mention of the guarantee in the bank records, aside from the guarantee itself.

The Bank later sold the Dine notes to LaSalle National Bank (LaSalle). LaSalle's records did not refer to a guarantee signed by O'Malley and Bekta. LaSalle later sold the notes back to the Bank.

In 1979, four years after the Bank made the loan to Dine, O'Malley decided to end his relationship with the Bank. He therefore sold his stock and resigned as director. According to O'Malley, as part of the termination, the Bank and O'Malley exchanged mutual releases. At trial, O'Malley introduced a letter from the Bank, dated October 1, 1979, which purported to release O'Malley from any obligations he owed to the Bank, including guarantees. This letter did not refer to the Dine notes. The letter was signed by Bank president Geary and notarized by vice-president Adams. At the time, Geary had the requisite authority to release guarantees in the amount of $225,000, the amount of the guarantee. Neither Geary nor Adams was aware of the guarantee signed by O'Malley.

O'Malley also introduced a letter dated October 4, 1979, that he purportedly wrote to the Bank. In the letter, O'Malley released the Bank from any obligations it owed to him. Geary testified that he placed both letters in the bank files.

Adamonis, the FDIC examiner, testified that he did not find any releases in his examination of bank records. Adamonis searched Dine's loan file, the board of director minutes, the loan committee minutes, internal audit reports, and other bank records. Adamonis did not find any personal loan file of O'Malley among bank records. He also stated that the FDIC possessed 400 or 500 boxes of bank documents and that he had not personally inspected all of the documents. Adamonis had not personally inspected Bekta's personal loan file or the bank corporate files.

On April 29, 1983, about 3 1/2 years after the purported releases were exchanged, the Bank was declared insolvent. The FDIC took control of the Bank and acquired its assets. James Murphy, an FDIC employee, testified with respect to the closing procedures used by the FDIC. Murphy testified that he closed the Bank pursuant to standard FDIC procedures.

During the closing, Murphy found the guarantee signed by Bekta and O'Malley among the Bank's collateral files. The guarantee, on its face, provided that it was absolute, continuing, and applied unconditionally to all of Dine's obligations at the Bank, as they existed or would exist in the future. The guarantee also authorized the Bank to extend and renew Dine's obligations, authorized release of the guarantors, and authorized the Bank to waive notice and demand. Under the terms of the guarantee, no action by the Bank would impair the Bank's rights against either guarantor. The guarantee was specifically limited to $225,000, plus interest due on the note and legal expenses.

During the closing, Murphy also found two outstanding and unpaid notes signed by Dine. The note relating to the Country Club Hills real estate had been renewed by Dine, and the principal under the renewal note was $279,456.49. Murphy also found another note for $643,852.50 signed by

Dine. Dine did not pay any principal or interest on these notes. The FDIC subsequently sought repayment from Dine but Dine filed for bankruptcy. On September 15, 1983, the FDIC demanded payment from O'Malley under the terms of the guarantee. O'Malley refused and the FDIC brought this action. Further facts will be provided as needed for discussion.

II. LOWER COURT PROCEEDINGS

After a bench trial, the circuit court found that Dine was indebted to the Bank in excess of $225,000, that O'Malley had executed a guarantee for $225,000, and that the FDIC located the guarantee in the collateral files of the Bank. It then found that O'Malley was barred under 12 U.S.C. § 1823(e) (1988) from arguing that the guarantee was legally insufficient or had been extinguished. Accordingly, the circuit court entered judgment in favor of the FDIC for $464,490.89, representing $225,000 in principal and $239,490.89 in interest.

On January 16, 1990, O'Malley filed a post-trial motion in which he asserted that he was entitled to a new trial because, inter alia, the circuit court judge should have disqualified himself pursuant to Supreme Court Rule 63(C)(1)(c) based on his prior representation of the FDIC. O'Malley also contested, inter alia, the amount of interest awarded by the circuit court. After a hearing, the circuit court denied the motion for a new trial but reduced the amount of interest awarded from $239,490.89 to $81,666.14. The appellate court affirmed the judgment but modified the award of interest from $81,666.14 to $83,446.71.

On appeal to this court, O'Malley raises, inter alia, the following issues: (1) whether the circuit court judge violated Supreme Court Rule 63(C)(1)(c) by failing to disqualify him-

self; (2) whether 12 U.S.C. § 1823(e) (1988) bars O'Malley from asserting that the guarantee was not an asset of the Bank; and (3) whether section 1823(e) is constitutional. The FDIC has cross-appealed, claiming that the award of interest by the lower courts was incorrect. Other issues raised by O'Malley are discussed below.

III. DISQUALIFICATION OF THE CIRCUIT COURT JUDGE

O'Malley first argues that the circuit court violated Supreme Court Rule 63(C)(1)(c). At the time of trial, this Rule provided:

> "C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where
>
> * * *
>
> (c) he was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy * * * or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law." (113 Ill. 2d R. 63(C)(1)(c).)

If a judge is disqualified under Rule 63(C)(1)(c), the judge may still participate in the proceedings. At the time of trial, Supreme Court Rule 63(D) provided:

> "D. Remittal of Disqualification.
>
> A judge disqualified by the terms of Canon 3(C)(1)(c) * * * may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification.

> If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship or interest is immaterial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding." 113 Ill. 2d R. 63(D).

O'Malley contends that the circuit court judge represented the FDIC within seven years of the commencement of trial. O'Malley argues that the judge participated in the case even though the parties did not complete a written remittal of disqualification. O'Malley argues that disqualification can only be waived by a written remittal. Thus, according to O'Malley, there was no effective waiver of disqualification and a new trial is required. We disagree.

The record reveals the following pertinent facts. On March 13, 1989, before trial, the circuit court judge disclosed his previous representation of the FDIC and his involvement in the liquidation of Gateway National Bank. The judge did not disclose how recent his representation of the FDIC was. Both sides indicated orally that they had no objection to the judge continuing in the case.

The case then went to trial. O'Malley did not raise the issue of disqualification during trial, and the judge entered judgment in favor of the FDIC. On January 16, 1990, ten months after the judge disclosed his representation of the FDIC, O'Malley filed a post-trial motion, asking the judge to grant a new trial because the judge had failed to disqualify himself and obtain a written remittal. After the post-trial motion was filed, the judge investigated further and discovered that he had worked on three FDIC cases as an attorney about six years before trial. These cases all involved the liquidation of Gateway National Bank. The judge stated that he had been unaware his representation of the FDIC occurred within seven years of trial.

The judge then disclosed the following additional information to the attorneys:

> THE COURT: "Yes, I personally represented the FDIC in all three of those cases.
>
> I can also indicate to you that there was no personal representation by me within the seven-year period, although I must indicate—and I am doing this from handwriting on the orders of the proceedings that are within these files—I should also indicate to you that I was a named partner of that firm and everything that had to do with that firm's representation of the FDIC at all times was under my direct supervision. There was no other partner of that law firm that was charged with the responsibility of supervising the FDIC case assigned to that firm at any time.
>
> MR. CHALFEN [counsel for FDIC]: You did not personally appear in court?
>
> THE COURT: Within the seven-year period, to the best of my knowledge, no, but I want to make it clear. Every lawyer who did appear in that court for that law firm within that seven-period would have done so under my direct supervision.
>
> MR. CHALFEN: May I also clarify what your Honor indicated, I believe at the commencement of the trial that you never personally represented the FDIC in its corporate capacity?
>
> THE COURT: No. I represented it only in its capacity as liquidator or receiver of the Gateway National Bank of Chicago * * * ."

After a hearing on the post-trial motion, the circuit court held that Rule 63(C)(1)(c) was not violated. The judge concluded that the FDIC in its corporate capacity is a different "party," within the meaning of Rule 63(C)(1)(c), than the

FDIC acting in its receivership capacity. Because the judge had not represented the FDIC in its corporate capacity, Rule 63(C)(1)(c) was not violated.

On appeal, the appellate court questioned the circuit court's reasoning. A majority of the appellate court, however, affirmed the circuit court on a different ground. Because the circuit court judge had only exercised a limited supervisory role in the three previous FDIC cases, the majority concluded that the judge had not "represented" the FDIC within the meaning of Rule 63(C)(1)(c).

We do not reach the issues decided by the lower courts. We can affirm the decision below on any ground supported by the record. Under the facts of this case, we find that the circuit court judge disclosed the basis for disqualification before trial and that O'Malley had an opportunity to inquire further. By failing to do so, O'Malley has forfeited his right to raise the issue at this time.

In this case, the circuit court judge disclosed his representation of the FDIC at an early stage. He also stated that his representation of the FDIC was in connection with the liquidation of Gateway National Bank. O'Malley, however, did not pursue the matter further until an unfavorable judgment was entered against him.

In this appeal, O'Malley argues that disqualification can only be waived by written remittal. We disagree. The purpose of Rule 63(C)(1)(c) is to disqualify a judge from further proceedings where that judge may be biased because of his earlier representation of a party. The rule contemplates that the basis for disqualification will be disclosed at an early stage. It is then possible to obtain a substitute judge. Alternatively, the parties and attorneys may sign a remittal, free from the judge's coercion, and agree to let the judge proceed.

In this case, O'Malley seeks to use the rule differently. O'Malley does not seek prospective recusal of the judge; he seeks nullification of the trial. Before O'Malley can seek a new trial, he must show that he did not know the reason for disqualification or have a reason to know. Other courts have adopted similar reasoning. (See, e.g., United States v. Murphy (7th Cir. 1985), 768 F.2d 1518; Sacramento & San Joaquin Drainage District v. Jarvis (1959), 51 Cal. 2d 799, 336 P.2d 530; Haire v. Cook (1976), 237 Ga. 639, 229 S.E.2d 436; Renforth v. Fayette Memorial Hospital Association, Inc. (1979), 178 Ind. App. 475, 383 N.E.2d 368; Citizens First National Bank v. Hoyt (Iowa 1980), 297 N.W.2d 329.) To hold otherwise would permit a party to await the outcome of a trial and object only when the outcome is unfavorable.

O'Malley suggests that Woods v. Durkin (1989), 183 Ill. App. 3d 870, 132 Ill. Dec. 357, 539 N.E.2d 920, requires a different result. In Woods, before trial, the circuit court judge told the parties that his daughter-in-law was an associate in the law firm representing the defendant. The judge told the attorneys that, under the rules, the parties and attorneys would have to execute a signed waiver before he could proceed. The judge, however, obtained an oral waiver of disqualification from the attorneys and then entered an order relating to discovery. The plaintiffs brought a motion to vacate the order because the parties and attorneys had not completed a written remittal. The judge vacated the discovery order and said that he would hear no more motions until a written remittal was completed. On appeal, the appellate court held that the circuit court judge had no discretion to obtain an oral waiver rather than a written remittal. Thus, the attorneys' oral waiver of the disqualification was not sufficient and the discovery order was invalid.

We find no conflict between our reasoning in this case and the appellate court's reasoning in Woods. In Woods, the plaintiffs knew the reason for disqualification and promptly raised the issue of a written remittal before trial. Here, before trial, O'Malley knew the judge had represented the FDIC previously although O'Malley did not know how recent the representation was. O'Malley waited until after trial before determining when the representation occurred. He then argued that the judge should have obtained a written remittal.

We emphasize that judges may not ignore the written remittal requirement and obtain an oral waiver instead of a written one. Where a judge has disclosed his disqualification, he must obtain a written remittal before continuing. Parties, however, must exercise due diligence before they can use the written remittal requirement as the basis for a new trial.

We note that the result could be different in this case if actual prejudice were shown. O'Malley, however, has not shown actual prejudice from the judge's prior involvement with the FDIC, and we find no indication of prejudice from the record. Prejudice is not shown from the mere fact that O'Malley lost at trial. Thus, we will not excuse O'Malley's failure to raise the written remittal requirement earlier.

IV. SECTION 1823(e)

O'Malley next argues that the lower courts misapplied section 1823(e). In the circuit and appellate courts, the FDIC successfully invoked section 1823(e) to prevent O'Malley from arguing that the guarantee was legally insufficient or had been extinguished. Whether section 1823(e) applies in this case is a question of law, which we review de novo. Federal Deposit Insurance Corp. v. Wright (7th Cir. 1991), 942 F.2d 1089, 1097.

Section 1823(e) is based on the doctrine first announced in D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp. (1942), 315 U.S. 447, 86 L. Ed. 956, 62 S. Ct. 676. In D'Oench, the FDIC sued to enforce promissory notes signed by the defendant and found among bank files. The defendant had an agreement with the bank that he would not receive any proceeds from the notes. In return, the bank agreed not to enforce the notes against the defendant. The purpose of this arrangement was to inflate the apparent value of the bank's assets, thus deceiving bank regulators.

The Supreme Court held that the defendant was barred from asserting this arrangement with the bank. The Court discussed the circumstances under which such arrangements would be barred:

> "The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." (Emphasis added.) (D'Oench, 315 U.S. at 460, 86 L. Ed. at 963-64, 62 S. Ct. at 681.)

Thus, the Court held that such arrangements would be invalid against the FDIC even if a defendant did not intend to deceive the FDIC.

In 1950, Congress enacted 12 U.S.C. § 1823(e) (1988). This Federal statute provides:

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and any person or

> persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank." (12 U.S.C. § 1823(e) (1988).)

An agreement that fails to meet all four requirements is barred. (Federal Deposit Insurance Corp. v. Manatt (8th Cir. 1991), 922 F.2d 486, 488; Wright, 942 F.2d at 1101.) Agreements that would ordinarily be valid under State law are invalid against the FDIC unless they meet the statutory requirements. Federal Deposit Insurance Corp. v. Powers (N.D. Ill. 1983), 576 F. Supp. 1167, 1169, aff'd (7th Cir. 1984), 753 F.2d 1076.

The Supreme Court has construed section 1823(e) narrowly. (Langley v. Federal Deposit Insurance Corp. (1987), 484 U.S. 86, 98 L. Ed. 2d 340, 108 S. Ct. 396.) In Langley, the FDIC sued to enforce notes signed by the defendants. The Court held that section 1823(e) precluded the defendants from arguing that a bank's fraudulent misrepresentations induced them to sign the notes. The Court adopted a strict construction of the statute and discussed the reasons for the statutory requirements:

> "One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities [citation], and when the FDIC is deciding whether to liquidate a failed bank [citation], or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank [citation]. The last kind of evaluation, in particu-

lar, must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' [Citation.] Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is implicit in its requirement that the 'agreement' not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank record 'contemporaneously' with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure.

* * *

* * * Petitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant. While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. * * *

The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e)." Langley, 484 U.S. at 91-95, 98 L. Ed. 2d at 347-49, 108 S. Ct. at 401-03.

V. APPLICATION OF SECTION 1823(e)

In this case, O'Malley seeks to avoid application of section 1823(e) entirely. He examines the language of section 1823(e) and argues that the FDIC must first acquire an asset before the statute applies. According to O'Malley, the FDIC has the burden of establishing the existence of an asset before it can invoke the statute. O'Malley presents three separate "no-asset" arguments.

A. Legal Sufficiency of the Guarantee

O'Malley first argues that the guarantee never formed part of the Dine loan transaction. He argues that he left the guarantee with Bekta, to be used only if Dine could not get the loan otherwise. In support of his argument, O'Malley relies on bank records that do not refer to a guarantee. O'Malley contends that it was insufficient for the FDIC to merely show that a document called a "guarantee" existed in the bank files.

As the appellate court noted, O'Malley's argument is very similar to an argument rejected in Powers, 576 F. Supp. 1167. In Powers, the FDIC sued to enforce a guarantee. Although Powers acknowledged signing the guarantee, he argued that he had never agreed to let the bank use the guarantee. When Powers signed the document, he left the remainder of the document blank, to be completed later. The FDIC later found the guarantee among the bank's files. Powers introduced affidavits to prove that the guarantee was not executed in connection with the underlying loan. The court, however, barred Powers' defenses under section 1823(e), finding that Powers relied on an unwritten understanding to undermine a facially sufficient guarantee.

Other courts have barred unwritten understandings arising under similar circumstances. See, e.g., Wright, 942

F.2d 1089 (note maker was barred from asserting that notes found in bank files were not intended to be used until bank approved a line of credit); Federal Deposit Insurance Corp. v. McClanahan (5th Cir. 1986), 795 F.2d 512 (the defendant "recklessly" signed a document in blank and thereby lent himself to a scheme that permitted the misrepresentation of assets); Adams v. Madison Realty & Development, Inc. (3d Cir. 1991), 937 F.2d 845 (investors who signed unconditional promissory notes could not raise fraud in the inducement as a defense); Federal Deposit Insurance Corp. v. Gardner (S.D. Miss. 1985), 606 F. Supp. 1484 (note maker could not assert agreement between bank president and note maker that bank would look solely to a third party for payment of the note).

Ultimately, O'Malley's argument is based on an understanding between O'Malley and Bekta that the guarantee would only be used if Dine could not get the loan on his own. O'Malley signed the guarantee, he left it with a bank director, the FDIC found the guarantee in the files, and O'Malley now argues that the guarantee would not be used unless certain circumstances arose. O'Malley's argument is based on the existence of an unwritten understanding that does not meet the statutory requirements. Once the FDIC found the guarantee in the bank records, it did not have to disregard the facially sufficient guarantee simply because other bank records did not refer to it. See Bowen v. Federal Deposit Insurance Corp. (5th Cir. 1990), 915 F.2d 1013, 1016 (the FDIC "has no duty to compile oral histories of the bank's customers and loan officers" and need not "retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes"); Armstrong v. Resolution Trust Corp. (1993), 157 Ill. 2d 49, 191 Ill. Dec. 46, 623 N.E.2d 291 (the borrowers could not avoid section 1823(e) by inferences drawn from bank records); see also Federal Deposit Insurance Corp. v. O'Neil (7th Cir. 1987), 809 F.2d

350, 353-54; Federal Deposit Insurance Corp. v. Zook Brothers Construction Co. (9th Cir. 1992), 973 F.2d 1448, 1453; Beighley v. Federal Deposit Insurance Corp. (5th Cir. 1989), 868 F.2d 776, 783-84.

B. Release

O'Malley next argues that he had a release agreement with the Bank that extinguished the guarantee. According to O'Malley, O'Malley and the Bank agreed to end their working relationship in 1979 and exchanged mutual letters of release. The circuit court found that this release agreement did not meet the requirements of section 1823(e). Specifically, the purported release agreement was not approved by the board of directors or loan committee of the Bank. O'Malley argues that the statutory requirements do not apply to the release agreement. According to O'Malley, section 1823(e) does not bar agreements showing that the FDIC never acquired an asset.

Federal courts have rejected O'Malley's argument. (Federal Deposit Insurance Corp. v. P.L.M. International, Inc. (1st Cir. 1987), 834 F.2d 248, 252; Wright, 942 F.2d at 1100-01; Federal Deposit Insurance Corp. v. Merchants National Bank (11th Cir. 1984), 725 F.2d 634, 639; Zook, 973 F.2d at 1452-53; Federal Deposit Insurance Corp. v. Waldron (D.S.C. 1979), 472 F. Supp. 21, 25) (this "no-asset" argument is "circular" because it requires a defendant to rely on an agreement, barred by the statute, to show that no asset exists); (Federal Deposit Insurance Corp. v. Cover (D. Kan. 1988), 714 F. Supp. 455 (an asset shown in the records of the bank remains an asset for purposes of section 1823(e) until the defendants show payment or introduce an agreement meeting the requirements of section 1823(e)).) Section 1823(e) allows the FDIC to rely on facially unqualified instruments contained in bank records. Agreements that

defeat these facially unqualified instruments must meet the statutory requirements. To allow O'Malley's defense would render the protection of the statute meaningless. Merchants, 725 F.2d at 639.

O'Malley relies on Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, and Federal Deposit Insurance Corp. v. Prann (D.P.R. 1988), 694 F. Supp. 1027, aff'd sub nom. Federal Deposit Insurance Corp. v. Bracero & Rivera (1st Cir. 1990), 895 F.2d 824, to support his "no-asset" argument. In those cases, however, the courts found that the underlying debts had been paid. Section 1823(e) does not apply where "the parties contend that no asset exists * * * and that such invalidity is caused by acts independent of any understanding or side agreement." (Emphasis in original.) (Merchants, 725 F.2d at 639.) A party asserting payment as a defense is not relying on a separate agreement to prove the asset invalid. (Federal Deposit Insurance Corp. v. Bracero & Rivera (1st Cir. 1990), 895 F.2d 824, 830.) In contrast, O'Malley's release defense is based on an agreement between O'Malley and the Bank.

Federal courts have applied section 1823(e) to bar individuals from asserting release agreements. In P.L.M., 834 F.2d at 252, the court rejected an argument based on similar facts. In that case, the defendants signed a continuing guarantee in favor of the bank. The defendants later obtained a release from the bank, but the guarantee remained in an active collateral file with no notation of cancellation. The FDIC sued to enforce the guarantee, and the defendants offered the release agreement to show that the guarantee had been extinguished before the FDIC took control. The court barred the use of this release agreement because it failed to meet the requirements of section 1823(e). See also Federal Deposit Insurance Corp. v. Rivera-Arroyo (1st Cir.

1990), 907 F.2d 1233 (written release agreements did not meet requirements of section 1823(e) and were therefore barred); Manatt, 922 F.2d 486 (the defendant, who had been a stockholder and lawyer for a bank, was barred from asserting an agreement where the notes were in the bank's files and bore no notation of cancellation); Resolution Trust Corp. v. McCrory (5th Cir. 1992), 951 F.2d 68 (the defendants could not assert a letter agreement of release even though bank officers testified that they had executed the agreement, two documents in the bank's official files referred to the agreement, and the agreement was kept in the files of the bank's outside attorney); Federal Deposit Insurance Corp. v. Krause (8th Cir. 1990), 904 F.2d 463 (the defendants could not assert a settlement agreement with the bank president because the notes were located in the bank's active files, bore no "paid" notation, and the bank's minutes did not reflect approval of this agreement); see also Federal Deposit Insurance Corp. v. Allen (6th Cir. 1986), 801 F.2d 863 (written agreement located in the bank's loan file was barred because it did not satisfy all of the statutory requirements).

O'Malley also relies on Federal Deposit Insurance Corp. v. Nemecek (D. Kan. 1986), 641 F. Supp. 740, to support his "no-asset" argument. In Nemecek, the court allowed the defendants to introduce an oral accord and satisfaction against the FDIC. In that case, the court held that an oral accord and satisfaction extinguished a note before the FDIC took control of a bank, so section 1823(e) did not apply. O'Malley argues that the same reasoning should apply to his release agreement.

We note that the reasoning in Nemecek has been criticized by other courts. (Federal Deposit Insurance Corp. v. National Consumer Alliance, Inc. (D. Kan. 1994), 1994 WL 326064 (noting that Nemecek was decided before the

Supreme Court's narrow construction of section 1823(e) in Langley); Cimarron Federal Savings & Loan Association v. McKnight (Okla. App. 1992), 840 P.2d 648; Cover, 714 F. Supp. 455.) In Cover, the court stated that to adopt the logic of Nemecek "would destroy the effect and protection of § 1823(e) and hamper the FDIC's ability to follow the purchase and assumption alternative by injecting uncertainty into the valuation of assets." (Cover, 714 F. Supp. 458.) In addition, the Nemecek reasoning is inconsistent with the reasoning of other courts that have addressed O'Malley's "no-asset" argument. We therefore decline to follow Nemecek.

C. Cancellation

O'Malley next argues that his release defense arises from the instrument the FDIC seeks to enforce. The guarantee explicitly gave the Bank the right to release O'Malley from his obligation. In some instances, Federal courts have held that section 1823(e) does not apply where a defense arises from the instrument the FDIC seeks to enforce.

O'Malley relies on Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743, and Riverside Park Realty Co. v. Federal Deposit Insurance Corp. (M.D. Tenn. 1978), 465 F. Supp. 305, in support of his position. In Howell, Continental Credit Corporation (Continental) and Howell entered into several lease agreements, which imposed obligations on both parties. Continental subsequently breached the agreements. The FDIC later took control of Continental and sought to enforce the leases against Howell. The Seventh Circuit held that the FDIC could not ignore the terms contained on the face of the leases. The court distinguished earlier cases involving "a facially valid note or guarantee imposing a unilateral obligation" to pay. Howell, 655 F.2d at 746.

In Riverside, the FDIC sought to foreclose a deed of trust that specifically incorporated the terms of a loan agreement by reference. Again, the court did not invoke section 1823(e) because the terms of the loan agreement appeared on the deed of trust that the FDIC was trying to enforce. Riverside was therefore allowed to raise breach of the loan agreement as a defense. The court found that section 1823(e) did not apply because "the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached." (Emphasis in original.) Riverside, 465 F. Supp. at 313.

In both cases, the court held that the FDIC could not selectively seek to enforce an agreement. The FDIC could not enforce some terms and ignore others that appeared in the same agreement. Here, in contrast, the guarantee did not contain terms that imposed responsibilities on the Bank. The guarantee provided only for the bare possibility that the Bank might issue a release at some point in the future. Thus, the FDIC would not know from a review of the guarantee that such a release existed. (See Federal Deposit Insurance Corp. v. Venture Contractors, Inc. (7th Cir. 1987), 825 F.2d 143, 149-50 (refusing to apply Howell to a continuing guarantee that imposed a unilateral obligation to pay); O'Neil, 809 F.2d at 354 (refusing to apply Howell because the note merely referred to a side agreement and did not contain the terms of the side agreement).) In this case, O'Malley relies on a separate release agreement to extinguish the guarantee.

In a related argument, O'Malley contends that the guarantee provides him with the unilateral right to cancel by giving written notice to the Bank. He again argues that this defense arises from the language of the guarantee and is therefore not barred by section 1823(e). O'Malley relies on Federal Deposit Insurance Corp. v. Panelfab Puerto Rico,

Inc. (1st Cir. 1984), 739 F.2d 26. In Panelfab, the court allowed the defendants to introduce a letter of cancellation because the letter was not part of a separate agreement between the bank and the defendants. But see O'Neil, 809 F.2d 350; P.L.M., 834 F.2d 248; Federal Deposit Insurance Corp. v. Virginia Crossings Partnership (8th Cir. 1990), 909 F.2d 306 (cancellation letter barred by section 1823(e)).

Even assuming that section 1823(e) does not apply to this written notice of cancellation, we find that O'Malley never executed a written notice satisfying the terms of the guarantee. The guarantee specifically requires written notice by O'Malley for cancellation. The circuit court found that no evidence had been introduced to show that O'Malley had invoked his right to cancel by written notice. The only written document to the Bank offered by O'Malley was a copy of a letter he purportedly sent to the Bank. The letter purported to release the Bank from its obligations; it did not refer to any obligations O'Malley owed to the Bank. Thus, even if section 1823(e) allows evidence of cancellation by written notice, O'Malley has not shown that he gave written notice.

VI. CONSTITUTIONALITY OF SECTION 1823(e)

O'Malley argues that the lower courts erred in requiring strict compliance with section 1823(e). He contends that those courts should have required only substantial compliance. We find this argument contrary to established law.

O'Malley argues that the release substantially complied with section 1823(e). In this case, the circuit court found that the purported release was not approved by the Bank's board of directors or loan committee and was not reflected in the minutes. O'Malley argues that it should be enough that Geary's authority to issue the release is part of the

board minutes. This specific argument has been rejected. Gardner, 606 F. Supp. 1484 (agreement between bank president and note makers was not valid because the agreement was not specifically approved by the board of directors or the loan committee even though the president had the authority to make such an agreement).

In addition, the Supreme Court has emphasized that courts must strictly construe the statute. (Langley, 484 U.S. at 95, 98 L. Ed. 2d at 349, 108 S. Ct. at 403.) The equities favor the FDIC and depositors, and Congress has erred on the side of certainty. (Langley, 484 U.S. at 94-95, 98 L. Ed. 2d at 349, 108 S. Ct. at 403; see also Wright, 942 F.2d at 1101; Federal Deposit Insurance Corp. v. Caporale (1st Cir. 1991), 931 F.2d 1, 2 ("As among borrowers, thrift regulators, depositors, and creditors, the borrower is in the best position to protect himself and must therefore suffer the risk of loss if he fails to ensure that his agreement is properly recorded").) As the appellate court noted, we are not at liberty to rewrite the plain terms of the statute.

O'Malley next contends that section 1823(e), if literally applied, is unconstitutional. O'Malley argues that the statute violates due process, equal protection, and impairs contractual rights. O'Malley, however, provides little support for these arguments and little authority for his reasoning. Courts have consistently rejected similar arguments. Chatham Ventures, Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1981), 651 F.2d 355, 362-63; Beighley v. Federal Deposit Insurance Corp. (N.D. Tex. 1987), 676 F. Supp. 130, 132-33; Resolution Trust Corp. v. Dadonna (3d Cir. 1993), 9 F.3d 312, 320-21; Campbell Leasing, Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1990), 901 F.2d 1244, 1248); see generally S. Lake, Banking Law: The D'Oench Doctrine and 12 U.S.C. § 1823(e): Overextended, but Not Unconstitutional, 43 Okla. L. Rev. 315 (1990) (dis-

cussing constitutional challenges based on taking of property without just compensation, procedural and substantive due process, and right to trial by jury).

VII. OTHER ISSUES

In addition to the three issues discussed above, O'Malley has raised the following issues: (4) whether the sale of the Dine notes to LaSalle discharged O'Malley; (5) whether the Bank's continued extensions of credit to Dine discharged O'Malley; (6) whether an alleged settlement between Bekta and the FDIC entitled O'Malley to a setoff; (7) whether the FDIC's alleged release of Bekta operated to partially release O'Malley; and (8) whether the appellate court awarded the appropriate amount of interest to the FDIC. The FDIC argues that these issues have been waived because they were not raised in the petition for leave to appeal. Under Rule 315(b)(3), a petition for leave to appeal shall state "the points relied on for reversal of the judgment of the Appellate Court." (134 Ill. 2d R. 315(b)(3).) A party's failure to raise an argument in the petition for leave to appeal may be deemed a waiver of that argument. (Dineen v. City of Chicago (1988), 125 Ill. 2d 248, 265-66, 126 Ill. Dec. 52, 531 N.E.2d 347.) Accordingly, we find these additional issues waived and decline to address them.

Finally, we note that the FDIC has cross-appealed the appellate court's award of interest. An examination of the guarantee shows that it fails to specify an interest rate. The circuit court concluded that O'Malley and the Bank intended for the rate in the underlying note to apply to the guarantee. At trial, the FDIC produced testimony concerning the interest rate used in the note. This interest rate was related to Continental Bank's prime rate. The circuit court found that the FDIC testimony failed to disclose the actual rates used or the source of these rates. The circuit court,

however, found that interest could be supported by other evidence produced at trial. The trial balance of the Bank on April 28, 1983, which showed the total interest due on Dine's notes, had been introduced as a business record. The circuit court therefore based its interest calculation on this balance. It did not award any interest after April 28 because the FDIC failed to prove the interest due under the guarantee. The appellate court agreed with the procedure used but found that the calculation was incorrect. It therefore modified the amount of interest awarded. After reviewing the record, we find no error in the appellate court's award of interest.

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

CHIEF JUSTICE BILANDIC, dissenting:

The majority opinion is fatally flawed by its erroneous application of section 1823(e) to the facts of this case. O'Malley's guarantee was discharged by mutual releases exchanged between O'Malley and the Bank. The FDIC has no authority to enforce a nonexistent guarantee. For this reason, I respectfully dissent.

Section 1823(e) provides that the rights and interests of the FDIC in assets acquired from a bank pursuant to its statutory duties cannot be diminished or defeated by agreements that do not meet certain requirements. (12 U.S.C. § 1823(e) (1988).) This section was enacted to protect the FDIC from secret agreements, and deceptive schemes or arrangements, between a bank and an obligor, which tend to misrepresent a bank's assets and ultimately mislead the FDIC. See Langley v. Federal Deposit Insurance Corp.

(1987), 484 U.S. 86, 92-93, 98 L. Ed. 2d 340, 347-48, 108 S. Ct. 396, 401-02; Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, 1245; Armstrong v. Resolution Trust Corp. (1993), 157 Ill. 2d 49, 61-62, 191 Ill. Dec. 46, 623 N.E.2d 291.

Section 1823(e), by its own terms, is not applicable under the facts of this case. Section 1823(e) applies only to assets acquired by the FDIC in a takeover. It does not apply to situations where no asset exists because it has been extinguished prior to the FDIC's takeover of the bank. See Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240; Federal Deposit Insurance Corp. v. Prann (D.P.R. 1988), 694 F. Supp. 1027, aff'd (1st Cir. 1990), 895 F.2d 824.

In this case, the guarantee that O'Malley executed in 1975 did not exist and thus was not an asset of the Bank at the time the FDIC acquired the Bank's assets. Approximately four years before the FDIC took over the Bank, O'Malley received a written release from the Bank, signed by its president, which released O'Malley from all obligations owed to the Bank. In consideration for this release, O'Malley released the Bank from any obligations it owed to him. Section 1823(e) does not apply to the facts here because O'Malley's release was not a secret agreement designed to deprive the FDIC of an otherwise valid asset. Rather, the release demonstrates that the guarantee was not an asset of the Bank at the time the FDIC took over the Bank. Thus, the majority incorrectly applies section 1823(e) in this case to prevent an innocent party from asserting a valid release.

Several courts have recognized that section 1823(e) does not apply under circumstances such as those at issue here.

In Commerce, a deed of trust was executed as security for a loan. The deed of trust contained a clause covering future

debts. The balance of the loan was subsequently paid, and the bank orally agreed to release the deed of trust. Meanwhile the bank failed and the FDIC was appointed as receiver of its assets. The FDIC acquired various assets of the failed bank, including the deed of trust and a second promissory note. The FDIC refused to release the deed of trust, contending that the second promissory note was secured by the deed of trust. The FDIC argued that the oral agreement to release the deed was barred by section 1823(e). The Sixth Circuit rejected the FDIC's position and held that the deed of trust was not an asset acquired by the FDIC. (Commerce, 872 F.2d at 1246.) The court concluded that the original loan had been satisfied before the FDIC's involvement and that the oral agreement to release the trust deed was enforceable and not barred by section 1823(e). Commerce, 872 F.2d at 1246.

Similarly, in Prann, the FDIC sought to recover on a promissory note. The court held that section 1823(e) was not applicable because the debt underlying the note was satisfied before the FDIC acquired the bank's assets. (Prann, 694 F. Supp. at 1037.) Consequently, the note was not an asset protected by section 1823(e).

The majority opinion attempts to distinguish Commerce and Prann by pointing out that the underlying debts had been paid, whereas in the instant case O'Malley relies on a release. The majority fails to comprehend that an obligation can be discharged in a number of ways, including obtaining a valid release. Consequently, the fact that the methods of discharge differed in those cases and the instant case is insignificant. Nonetheless, it is significant that full payment in Commerce and Prann and full release of O'Malley in the instant case both occurred prior to the FDIC's acquisition of any assets. By discharging the release prior to the FDIC's takeover of the Bank, the guarantee did not exist as an asset.

For the reasons stated, the FDIC had no authority to consider the guarantee as an asset of the Bank. Since it was not an asset of the Bank, it could not be enforced against O'Malley. Accordingly, I dissent from the majority's decision.

JUSTICE HARRISON, also dissenting:

The circuit judge admitted that he represented the FDIC within seven years of the commencement of trial. Under the clear and unambiguous language of Rule 63(C)(1)(c) (113 Ill. 2d R. 63(C)(1)(c)), the judge could not sit on the case and was required to disqualify himself. (See Woods v. Durkin (1989), 183 Ill. App. 3d 870, 874, 132 Ill. Dec. 357, 539 N.E.2d 920.) Although Rule 63(D) (113 Ill. 2d R. 63(D)) has a provision for remittal of disqualification, there is no dispute that the requirements of that provision were not satisfied here. O'Malley is therefore entitled to a new trial.

The majority denies this relief on the theory that O'Malley failed to exercise due diligence. Such a position is untenable as a matter of law. Under the system we have fashioned, the burden of insuring compliance with the rules governing disqualification lies with the judge, not the litigants. If a judge is disqualified under Rule 63(C)(1)(c), he must remove himself from the case. The matter is not discretionary, and does not depend on action by the parties. Judges are expected to recognize on their own when they should refrain from hearing a case. It could not be otherwise, for often the judge will be the only one in the courtroom who knows of the facts that disqualify him.

The terms of our disqualification rules are clear and absolute. Once disqualified, a judge remains disqualified unless the requirements of the remittal provision are satisfied.

(See Woods, 183 Ill. App. 3d at 874.) There are no exceptions, and the rule is not subject to waiver by oral agreement of counsel. (See Woods, 183 Ill. App. 3d at 875.) If the judge wants to hear the case, it is up to him to obtain the necessary written agreement. (113 Ill. 2d R. 63(D).) The rule provides that he may ask the parties and their attorneys to consider waiver of disqualification. It does not obligate the parties or their attorneys to ask that he ask or to otherwise police his judicial responsibilities.

The majority's position must also fail on the facts. O'Malley could not have pursued the matter of disqualification sooner because he did not know about it. As the appellate court noted, O'Malley was not in court when the judge disclosed his representation of the FDIC, and O'Malley's attorney never discussed waiver of any conflict of interest with him. (249 Ill. App. 3d at 361.) That O'Malley's attorney knew of the judge's connection to the opposing party is of no consequence. Under the express terms of Rule 63(D), agreement of counsel is insufficient. The parties themselves must agree to remittal of the disqualification in order for it to be effective. O'Malley did not so agree. The circuit judge was therefore prohibited from hearing the case. Accordingly, I dissent.

(Letterhead Of)

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December 5, 1994

No. 76106—Federal Deposit Insurance Corporation, appellee, v. Michael J. O'Malley, appellant. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 15, 1994.

Opinion of the Appellate Court of Illinois
First District—Fifth Division
No. 1-90-1718—Filed June 25, 1993

Federal Deposit Insurance Corporation,

Plaintiff-Appellee and Cross-Appellant,

v.

Michael J. O'Malley,

Defendant-Appellant and Cross-Appellee.

Appeal from the Circuit Court of Cook County.
The Honorable Thomas E. Hoffman, Judge Presiding.

JUSTICE COUSINS, JR. delivered the opinion of the court:

The defendant, Michael J. O'Malley (O'Malley), appeals from the final judgment of the circuit court entered against him and in favor of the plaintiff, the Federal Deposit Insurance Corporation (FDIC). On April 29, 1983, the First National Bank of Oak Lawn (the Bank) was closed due to insolvency, and the FDIC, in its corporate capacity, obtained the assets of the Bank for the purpose of liquidation. Among the Bank's records, the FDIC found an original written guaranty signed by O'Malley which purported to guarantee the indebtedness of one Dennis G. Dine (Dine). On January 1, 1984, the FDIC, in its corporate capacity, brought suit against O'Malley to enforce the guaranty. O'Malley claimed that the guarantee never formed part of the Dine loan transaction. O'Malley also argued, inter alia, that the Bank released him from all obligations prior to the FDIC takeover. Following a bench trial, the circuit court

held that O'Malley's defenses were barred by 12 U.S.C. 1823(e) and entered judgment in favor of FDIC.

We affirm.

BACKGROUND

The First National Bank of Oak Lawn was declared insolvent and closed on April 29, 1983. The FDIC, in its corporate capacity, obtained the assets of the Bank for purposes of liquidation. Among the Bank's records, the FDIC found an original written guaranty signed by O'Malley which purported to guarantee the indebtedness of Dennis Dine.

O'Malley's guaranty provided that it was absolute and continuing, and that O'Malley unconditionally guaranteed all of Dine's obligations to the Bank, whether then existing or created in the future. Among other things, the guaranty authorized the Bank's extension or renewal of Dine's obligations, release of liability of any of the guarantors, and waivers of notice and demand. O'Malley's guaranty was limited to the amount of $225,000, plus interest on such amount and expenses.

The Bank's records also contained two outstanding and unpaid original Dine notes. Evidence indicated that Dine was indebted to the Bank in the amount of at least $225,000 since February, 1975, when he borrowed money from the Bank to purchase real estate. Dine subsequently signed a renewal note in the principal amount of $279,456.49 and another note in the principal amount of $643,852.50, both of which were dated April 28, 1981 and due October 26, 1981. Dine did not repay any principal or interest due under his two notes.

On September 15, 1983, FDIC sent a letter to O'Malley demanding payment under the guaranty, but O'Malley failed to pay any amounts to the FDIC. On January 1, 1984, FDIC brought suit against O'Malley to recover the amount due from O'Malley under the guaranty.

O'Malley denied that he ever guaranteed the 1981 Dine loans and denied that the guaranty he signed was ever used or required in connection with any Dine loan at the Bank. Alternatively, O'Malley raised two affirmative defenses. First, that in 1979, four years prior to the FDIC takeover, he had been released in writing by the Bank from any guaranty obligations. Second, O'Malley claims that the exchange of mutual releases between the Bank and O'Malley in 1979 served as notice in writing to the Bank that any claimed guaranties were cancelled as of October 1979.

With respect to O'Malley's contention that the guaranty was never used or required in connection with any of the Dine loans, O'Malley presented the following evidence at trial. O'Malley testified that in 1975 both he and Wayne J. Bekta (Bekta) were on the board of directors of the Bank. O'Malley and Bekta were also business partners in various real estate transactions and developments. In 1975, he and Bekta became interested in developing a piece of real estate in Country Club Hills, Illinois. Dine, an experienced real estate developer and a long standing customer of the Bank, also participated in the transaction. The parties agreed that Dine would borrow money, purchase the property and take title to the property; when the property was developed or sold, all three parties would profit.

Bekta and O'Malley subsequently agreed, between themselves, that if Dine could not get the loan for the $225,000 purchase price on his own, they would supply their personal guaranty. Sometime prior to February 28, 1975, Bekta and O'Malley signed the guaranty form in Bekta's car while the two were making an inspection of their business properties. O'Malley left the guaranty with Bekta.

On February 28, 1975, Dine secured the loan for $225,000. Evidence presented at trial indicated that the

guaranty was not used in connection with the loan because the property was appraised for loan purposes at $420,000, nearly twice the amount of the purchase price. O'Malley testified that he did not know how the guaranty document got into the Bank file. At the time of trial, Bekta was deceased.

John Geary testified that in 1975, he was president of the Bank and that Dine had been a customer of the Bank for some years prior and subsequent to 1975. Geary was the loan officer who personally handled and approved the $225,000 loan to Dine on February 28, 1975. The only collateral required for the Dine loan was the Country Club Hills property which had been appraised at $420,000. Geary testified that the Dine loan was not made on the basis of any guaranty signed by Bekta or O'Malley. He testified that the first time he had ever seen the guaranty signed by O'Malley and Bekta was during his discovery deposition.

A number of documents pertaining to the Dine loan supported Geary's testimony. For example, the loan proposal prepared by Geary in 1975 contains no indication of any guaranty requirements. The collateral checklist likewise does not indicate that a guaranty was required for the Dine loan. Additional documents admitted at trial corroborated Geary's testimony as well.

Dine testified that in 1975 he was a real estate developer. In 1975, he agreed with Bekta and O'Malley to purchase the Country Club Hills property because he hoped to receive a commission upon resale. He borrowed the money, took title to the property in a land trust, and assigned the beneficial interest of the land trust to secure the $225,000 loan in 1975. Dine testified that at no time was anyone, other than himself, required to guaranty the loan. He testified that the first time he ever saw or heard of the guaranty document in this case was at his discovery deposition.

In April of 1981, the two 1981 Dine loans were sold to the LaSalle National Bank, and the sale was approved by Geary. Mark Hoppe, vice president of the commercial lending department at LaSalle National Bank testified that he was unable to locate any document among LaSalle's records that would indicate that a guaranty formed a part of the collateral or other documentation for the Dine loans purchased by LaSalle National Bank. The Bank later chose to repurchase the loans, though it was under no legal obligation to do so.

With respect to O'Malley's affirmative defense that he was released from any guaranty obligations prior to the FDIC takeover, the following evidence was presented at trial. O'Malley testified that in 1979, five years after the loan was made and four years before the FDIC takeover, O'Malley sold his stock in the Bank and resigned as a director. He had no further dealings with the Bank after that date.

John Geary corroborated O'Malley's testimony. Geary testified that in 1979, O'Malley sold his stock in the Bank and terminated his business relationships with the Bank. This was part of an arm's length transaction and both sides were represented by counsel. At that time Geary, as president of the Bank, gave O'Malley a written release from any and all obligations at the Bank including any guaranties. The release was witnessed by the vice president of the Bank, Nancy Adams. In return, Geary demanded and received from O'Malley a written release, releasing the Bank from any claims by O'Malley. Geary was authorized to execute releases to the same extent that he was authorized to approve loans. His lending authority at the time for secured loans was between $350,000 and $750,000. Geary testified that the release documents were placed in the Bank's records.

However, Greg Adamonis, an FDIC liquidator and one of plaintiff's witnesses, testified that he was unable to locate a copy of the Bank's release to O'Malley among the Bank's records. Adamonis also testified that there were 400 or 500 boxes of bank documents in the possession of the FDIC and that he had not inspected them all. Among the files Adamonis did not inspect were O'Malley's files, Bekta's files and the Bank's corporate files. The defendant sought leave to have an expert, Ernst & Whinney, conduct a document audit of the Bank's records to attempt to locate a copy of the release or other relevant information. Defendant also sought the disclosure of the names of the FDIC "closing team" who participated in the closing of the bank. The circuit court refused to grant O'Malley's request and denied O'Malley's motion. Therefore, O'Malley claims that he was not in a position to rebut the testimony of the FDIC witnesses that a copy of the "release" was not in the Bank's records at the time of closing.

The FDIC did not attack the underlying validity of the release given to O'Malley. Instead, the FDIC took the position that O'Malley was precluded from asserting the release against the FDIC because the release failed to meet the requirements of 12 U.S.C. 1823(e) which provides in relevant part:

> "No agreement which tends to diminish or defeat the right, title or interest of the Federal Deposit Insurance Corporation and any asset acquired by it under this Section either as security for a loan or by purchase shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the

board of directors of the bank or its loan committee which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously from the time of its execution an official record of the bank."

Following a bench trial, the circuit court reached the following conclusions of law and fact:

"One that the Defendant did in fact execute the guarantee which is the subject of this cause on or about February 25th, 1975.

Second that after execution the Defendant left the subject guarantee with Mr. Betka [sic], a co-maker thereof and also a director of the then First National Bank of Oak Lawn.

Thirdly [sic], that the original of the subject guarantee was found in the collateral vaults in the First National Bank of Oak Lawn on the day after the FDIC took possession of that institution and was found in the file with the notes of Dennis Dine.

Fourthly [sic], the First National Bank of Oak Lawn funded a loan to Dennis Dine in the sum of $225,000 on February 28th, 1975.

Fifthly [sic], that at no time from February 28th, 1975 until this discharge in bankruptcy was Dennis Dine ever indebted to the First National Bank of Oak Lawn or the FDIC as its successor in interest in any sum less than $225,000, the maximum principal obligation on the guarantee which is the subject of this action.

Sixthly [sic], that the FDIC as receiver of the First National Bank of Oak Lawn transferred and assigned the guarantee to the FDIC in its corporate capacity.

Seventh, FDIC in its corporate capacity is the holder of the guarantee which is the subject of this action.

Eighth, that the Defendant has failed and refused to make any payments due pursuant to the terms of the subject guarantee for either principal or interest.

Ninth, that as of March 13th, 1989 Dennis Dine was indebted to the FDIC in its corporate capacity in principal sums in excess of $225,000 by reason of two notes executed April 28th, 1981.

Tenth, that as of March 13th, 1989, there was interest accrued on the obligation pursuant to the subject guarantee in the sum of $235,411.64, and interest continues to accrue thereon at the rate of $83.25 per day.

Eleventh, that any agreements between the Defendant and Wayne Betka [sic] that the subject guarantee would only be used by the First National Bank of Oak Lawn if same were necessary for that intitutuion [sic] to grant a lona [sic] to Dennis Dine is and was an unwritten agreement, invalid, unassertible as against the FDIC by reasons of the provisions of Section 1823-E, Title 12 of the United States Code.

Twelfth, that the release executed by the then First National Bank of Oak Lawn dated October 1, 1979, was not approved by its Board of Directors or ban Committee, nor was any approval thereof reflected in the minutes of the Board or Loan Committee, and as a consequence thereof the release is invalid and unassertible as against the FDIC by reason of the provisions of Section 1823-E of Title 12 of the U.S. Code.

Thirteen, the fact that the First National Bank of Oak Lawn did not in fact rely upon the subject guarantee in making of the loan of February 28th, 1975 to Dennis G. Dine is irrelevant for the purposes of application of

Section 1823-E generally under the holding of FDIC versus TWT 626 Fed sup [sic] 149.

Fourteen, no evidence has been introduced of any written notification by the Defendants to the First National Bank of Oak Lawn discontinuing the subject guarantee as required by the terms thereof, and any oral notification of discontinuance given or accepted being at variance with the terms of the subject guarantee is also invalid and unassertible against the FDIC by reason of Section 1823-E.

Fifteen, that even if one were to argue that the issuance of the release was an exercise of a unilateral right to release by the First National Bank of Oak Lawn as provided on the face of the guarantee, the exercise of that right of the issuance of the release on October 1, 1979 is unassertible as against the FDIC pursuant to Section 1823-E by reason of the lack of any approval therefore [sic] by the Board of Directors or ban Committee reflected in the minutes of the First National Bank of Oak Lawn."

On May 1, 1989, based upon the foregoing reasons, the trial court entered judgment in favor of FDIC and against O'Malley for a total sum of $464,490.80, consisting of $225,000 in principal and $239,490.89 in accrued interest. The order provided that it was nonfinal until the issue of attorney fees was resolved.

On January 16, 1990, O'Malley filed a post-trial motion in which he asserted that he was entitled to a new trial because, inter alia, Judge Hoffman should have recused himself pursuant to Supreme Court Rule 63(C)(1)(c) (113 Ill. 2d R. 63(C)(1)(c)) based on his prior representation of FDIC within the past seven years. O'Malley also contested the amount of interest awarded by the court on the guaranty.

On May 16, 1990, following a hearing, the trial court concluded that Supreme Court Rule 63(C)(1)(c) had not been violated, and denied O'Malley's motion for a new trial. The trial court held that the FDIC in its corporate capacity was not the same "party" as the FDIC as receiver. Since the trial judge had only represented the FDIC as receiver within the past seven years and the party before the court was the FDIC in its corporate capacity, the trial judge concluded that no violation of Rule 63(C)(1)(c) occurred.

The trial court granted the portion of O'Malley's motion which sought a reduction in the amount of interest awarded on the guaranty, and reduced the previous award of interest from $239,490.89 to $81,666.14. This appeal followed.

O'Malley presents the following arguments on appeal: (1) the trial court erred in finding that the guaranty was an "asset" of the Bank at the time of the FDIC takeover; (2) the trial court erred in finding that the release was not in substantial compliance with the provisions of section 1823(e); (3) the trial court erred in refusing to declare section 1823(e) unconstitutional; (4) the trial court erred in failing to find that O'Malley was discharged from the guaranty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle Bank; (5) the trial court erred in failing to grant O'Malley a setoff based on funds received from the sale of collateral securing the Dine loan and funds received from the settlement with the estate of Bekta; (6) the trial court erred in failing to find that O'Malley was entitled to a partial release of liability on the guaranty due to the FDIC's release of the alleged co-guarantor, Bekta; (7) the trial court erred in finding that the FDIC was entitled to interest on the guaranty; and (8) the trial court erred in denying the defendant a new trial where the provisions of Supreme Court Rule 63(C)(1)(c) were not complied with.

In its cross appeal, the FDIC asserts that the trial court erred in reducing its award of interest due to FDIC under O'Malley's guaranty.

I

Initially, O'Malley contends that the trial court erred in finding that the guaranty was an "asset" of the Bank at the time the FDIC took over. O'Malley presents three separate arguments in support of his contention that the guaranty was not an asset.

First, O'Malley argues that the guaranty was not a valid asset of the Bank because the guaranty never formed part of the Dine loan transaction. O'Malley asserts that the FDIC had the burden of demonstrating that the guaranty was valid and the FDIC failed to meet its burden.

O'Malley's argument is contrary to the law. The only burden the FDIC can be said to bear on this issue is the burden of demonstrating that the guaranty was found among the active files of the Bank. (See Federal Deposit Insurance Corp. v. Venture Contractors, Inc. (7th Cir. 1987), 825 F.2d 143, 146-47.) The FDIC met this burden. Mr. Murphy, a member of the FDIC takeover team testified that he found the guaranty in the Dine collateral file. O'Malley does not dispute that the Dine collateral file was an active file of the Bank.

O'Malley admits that he signed the guaranty. O'Malley also admits that he left the signed guaranty with Bekta, a member the Bank's board of directors. On its face, the guaranty is unconditional and applies to all liabilities owed by Dine up to $225,000. O'Malley's attempt to establish that the guaranty was never used in connection with any of the Dine loans is based upon his claim that he and Bekta had an understanding that the guaranty would only be used in the event that it was needed to secure the initial Dine loan.

Proof of this unwritten understanding is precluded by section 1823(e).

O'Malley's argument was specifically rejected in Federal Deposit Insurance Corp. v. Powers (N.D. Ill. 1983), 576 F. Supp. 1167, aff'd (7th Cir. 1984), 753 F.2d 1076. In Powers, the FDIC in its corporate capacity sought to enforce guaranty instruments. As in the instant case, the closed bank's files contained the guaranty instruments. One of the defendants, like O'Malley, contended that he never agreed to guaranty the subject obligations, and pointed out that the FDIC was unable to produce any listing of his guaranty in the bank's collateral register. The court rejected the defendant's contention that the guaranty was invalid, holding that the asserted defense was barred by section 1823(e):

> "The court holds Powers' asserted defense to be barred by Section 1823(e). The FDIC sues Powers on a facially sufficient written guarantee, and he wishes to defend on the basis of informal, unwritten arrangements and understandings between him and Drovers officials. These arrangements and understandings may have been convenient for the parties thereto, but they were not reflected in Drover's records. Powers wishes ultimately to prove that no guarantee contract ever existed, but that does not change the fact that he is asserting the type of private agreement that is invalidated by Section 1823(e)." Powers, 576 F. Supp. at 1171.

The reasoning of Powers is equally applicable to the case at bar. Accordingly, the trial court correctly held that section 1823(e) precluded O'Malley from asserting that the guaranty was invalid because it was not used in connection with the Dine loans.

O'Malley next asserts that the guaranty was not an asset of the Bank because the guaranty was extinguished by a written release executed by the Bank four years prior to the

FDIC takeover. The trial court held that O'Malley was barred from asserting the release as a defense because the release did not meet all of the requirements of section 1823(e). Specifically, the trial court found that the release was not reflected in the minutes of the Bank's board of directors. O'Malley attempts to avoid this result by asserting that section 1823(e) does not apply to assets which are extinguished prior to the FDIC takeover.

It is true that section 1823(e) does not apply to every inquiry concerning an asset. (Federal Deposit Insurance Corp. v. Merchants National Bank of Mobile (11th Cir. 1984), 725 F.2d 634, 639, cert. denied, 469 U.S. 829, 83 L.Ed. 2d 57, 105 S.Ct. 114.) For example, section 1823(e) does not bar the defense of fraud in factum. (See Langley v. Federal Deposit Insurance Corp. (1987), 484 U.S. 86, 98 L. Ed. 2d 340, 108 S.Ct. 396.) Section 1823(e) also does not bar the defense that the asset is invalid due to the breach of bilateral obligations contained on the face of the asset that the FDIC seeks to enforce. (See Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743.) However, O'Malley's release does not fit within any of the narrow exceptions previously recognized by the Federal courts.

Furthermore, each of the cases O'Malley relies on is readily distinguishable. In Federal Deposit Insurance Corporation v. Nemecek (D. Kan. 1986), 641 F. Supp. 740, the Decatur County National Bank brought suit against the defendants-debtors to recover on an overdue mortgage prior to the FDIC takeover. The parties reached a settlement agreement whereby the debtors promised to deliver to the bank quit claim deeds for the mortgaged property, and the bank promised to forgo seeking foreclosure and a deficiency judgment against the defendants. The quit claim deeds were delivered to the bank's attorneys by the defendants prior to the date the bank was taken over by the FDIC.

However, the deeds were not yet in the bank's possession, and a formal release of liability had not been signed by the bank prior to its closure.

The FDIC was appointed as receiver for the bank and was substituted as plaintiff in the bank's suit against the defendants. In response to the defendants' motion to enforce the settlement agreement, the FDIC asserted that under section 1823(e), the FDIC could not be bound by an oral settlement agreement which tended to reduce its interest in assets acquired from the bank.

The court refused to apply section 1823(e) to bar enforcement of the settlement because "section 1823(e) applies only to assets which the FDIC has acquired." (Nemecek, 641 F. Supp. at 743.) (Emphasis in original.) The court found that the bank and the defendants had reached an accord and satisfaction prior to the bank's closing. "Therefore, when the FDIC purchased the bank's assets, it could not have purchased defendants' note, as it had been previously extinguished." Nemecek, 641 F. Supp. at 743.

Unlike the defendants in Nemecek, O'Malley did not demonstrate that an accord and satisfaction took place. Instead, O'Malley relies on a blanket release which purported to release him from all liabilities owed to the Bank. The release does not mention the Dine guaranty and Geary testified that he was not even aware of the Dine guaranty when he issued the release. Accordingly, we find that Nemecek is inapposite to the facts of this case.

The remaining cases cited by O'Malley also fail to support his contention. In Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, the court refused to apply section 1823(e) where the bank records pertaining to the instrument which the FDIC sought to enforce clearly indicated that the instrument had been "paid in full". In contrast to Commerce, nowhere in

the Bank's records is there any indication that O'Malley's guaranty was paid in full. In fact, O'Malley has never claimed that he paid the guaranty in full. He argues instead that his obligations were extinguished by a purported release which does not even refer to the guaranty on the Dine loan. Therefore, is also inapposite to the facts at bar.

O'Malley's reliance on Federal Deposit Insurance Corp. v. Blue Rock Shopping Center (3d Cir. 1985), 766 F.2d 744, is similarly misplaced. The holding of Blue Rock has been limited by a subsequent case from the Third Circuit. See Adams v. Madison Realty & Development, Inc. (3d. Cir 1991), 937 F.2d 845.

Each of the cases relied upon by O'Malley to support his contention that his obligation under the guaranty was extinguished prior to the FDIC takeover is inapposite. In contrast to the cases relied upon, O'Malley did not present any evidence at trial which would indicate that his guaranty was extinguished through an accord and satisfaction or full payment prior to the FDIC takeover. O'Malley may not avoid the requirements of 1823(e) by asserting that the guaranty was extinguished via an instrument which does not comply with 1823(e). The trial court properly rejected O'Malley's contention that the guaranty was extinguished prior to the FDIC takeover and, therefore, was not an "asset".

O'Malley next contends that the trial court erred in failing to recognize that section 1823(e) does not bar defenses which arise out of the same document which the FDIC seeks to enforce. O'Malley argues that because the guaranty states that the Bank may release him and that he may cancel his guaranty upon certain conditions his defenses arise from the guaranty instrument itself and, therefore, are not barred by section 1823(e). O'Malley's final attempt to evade the requirements of section 1823(e) is unavailing.

A narrow exception to the application of section 1823(e) has been recognized in cases where the instrument the FDIC seeks to enforce facially manifests bilateral obligations. (See Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743.) In Howell, the FDIC sought to recover sums due under a lease agreement obtained from a closed bank. The defendant argued that it was not obligated to make the lease payments because the bank never performed its obligations under the lease. The FDIC maintained that the defendants' defense was barred under section 1823(e). Relying on reasoning from Riverside Park Realty Co. v. Federal Insurance Deposit Corp. (M.D. Tenn. 1978), 465 F. Supp. 305, the court held that section 1823(e) was not applicable under to the facts of that case:

> "When the enforcement of a separate collateral or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title or interest in the asset would be defeated or diminished, section 1823(e) comes into play. [Citations.]
>
> When, however, the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached by the FDIC's assignors, section 1823(e) does not apply. None of the policies that favor the invocation of this statute are present in such cases because the terms of the agreement that tend to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC seeks to enforce." Howell, 655 F.2d at 747 quoting Riverside, 465 F. Supp. at 313. (Emphasis in original.)

Similarly, in Riverside, the court held that section 1823(e) did not bar the defendants from asserting a breach of the terms of a loan agreement which was incorporated by reference into the deed of trust that the FDIC sought to enforce. Both Riverside and Howell are distinguishable from the case at bar.

Unlike the instrument in Howell, O'Malley's guaranty does not facially manifest bilateral obligations which serve as the basis of his defense. Nor does O'Malley contend that any term of his guaranty was breached. The Bank did not agree in the guaranty instrument to release O'Malley. The language of the guaranty merely indicates that the Bank may, at its option, release a guarantor without notice. Such a release would constitute a separate agreement which must meet the requirements of section 1823(e).

O'Malley's contention that his cancellation defense arises from the guaranty itself and, therefore, should not have been barred under section 1823(e) is equally unpersuasive.

We note that the guaranty does provide that O'Malley may cancel his obligations under the guaranty if he provides "written notice to the Bank of [his] discontinuance of [the] guaranty." O'Malley contends that the mutual exchange of releases between O'Malley and the Bank constituted "written notice of discontinuance" as well as notice to the Bank that O'Malley was no longer a party to the guaranty subsequent to October 1, 1979. We disagree.

O'Malley's reliance on Federal Deposit Insurance Corp. v. Panelfab Puerto Rico, Inc. (1st Cir. 1984), 739 F. 2d 26 is misplaced. In Panelfab, the court found that the defendants had in fact executed a valid cancellation of their guarantees which complied with the express terms of the guaranty. (Panelfab, 739 F. 2d at 29.) The cancellation letter specifically referred to the guarantees at issue and the cancellation letter indicated that other guarantees had been substituted in place of the guarantees which were cancelled. In contrast, neither of the alleged releases which O'Malley relies on refer to the guaranty at issue. The documents are merely blanket releases. Neither release purports to provide notice of cancellation of the guaranty. In fact Geary, the president of the Bank, testified that he was not even aware

of the guaranty when he issued the release. The trial court did not err in finding that these documents could not serve as "written notice of discontinuance" as required by the guaranty agreement.

Although O'Malley has presented many innovative arguments in support of his contention that his guaranty was not an "asset" of the Bank at the time of the FDIC takeover, we remain unconvinced. The trial court properly held that O'Malley's guaranty was an asset under section 1823(e) and that O'Malley's defenses were barred by section 1823(e).

II

O'Malley next contends that the trial court erred in not finding that the alleged release was in substantial compliance with section 1823(e). O'Malley complains that the trial court took the position that "strict, literal, compliance with the provisions of section 1823(e) was required to remove the agreement from [the] statute's application." O'Malley's contention is devoid of merit; the trial court correctly applied the statute as written.

O'Malley has not cited any authority for the proposition that "substantial compliance" with section 1823(e) is sufficient to remove an agreement from the statute's requirements, and we are aware of none. Congress opted for certainty in enacting the requirements set forth in section 1823(e) (see Langley, 484 U.S. at 95, 98 L.Ed. 2d at 349, 108 S.Ct at 403), and this court is not at liberty to substitute a "substantial compliance" standard for the plain language of the statute. Accordingly, we hold that the trial court did not err in concluding that O'Malley's purported release failed to meet the requirements of section 1823(e).

III

O'Malley next contends that the trial court erred in refusing to declare section 1823(e) unconstitutional either

because it is vague and overbroad or because it impairs the obligations of contracts. O'Malley's contention that section 1823(e) is unconstitutional is without merit.

Section 1823(e) is in essence the codification of the United States Supreme Court case of D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corp. (1942), 315 U.S. 447, 86 L.Ed. 956, 62 S. Ct. 676. In D'Oench, the Supreme Court recognized that Federal policy protects the FDIC and the public funds it insures against misrepresentations of the bank's assets. To promote this Federal policy the Supreme Court concluded that as a matter of Federal common law, a borrower was estopped from asserting unrecorded agreements not reflected in the records of the bank against the FDIC. D'Oench, 315 U.S. 459, 461-62, 86 L. Ed. 963, 964, 62 S. Ct. 680, 681.

In 1950, Congress codified the D'Oench doctrine in 12 U.S.C. section 1823(e). No court in the nation has ruled that this statute is unconstitutional. The statute has been in effect for four decades and has been construed and enforced repeatedly by the Federal courts, including the United States Supreme Court. (See e.g. Langley, 484 U.S. 86, 98 L. Ed. 2d 340, 108 S. Ct. 396.) The few courts which have considered a constitutional challenge to section 1823(e) quickly dismissed such contentions with little discussion. (See e.g. Chatham Ventures Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1981), 651 F.2d 355, cert. denied (1982), 456 U.S. 972, 72 L. Ed. 2d 845, 102 S. Ct. 2234; Beighly v. Federal Deposit Insurance Corp. (N.D. Tex. 1987), 676 F. Supp. 130, aff'd (5th Cir. 1989), 868 F.2d 776.) We conclude that the trial court did not err in rejecting O'Malley's constitutional challenge to section 1823(e).

IV

O'Malley next contends that the trial court erred in failing to find that O'Malley was discharged from the guar-

anty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle bank. This contention is wholly lacking in merit.

The express provisions of the guaranty authorize the Bank to sell the loans and extend additional credit to Dine without impairing the validity of the guaranty. The relevant provisions of the guaranty are as follows:

> "This guaranty shall be a continuing, absolute and unconditional guaranty * * *
>
> The Bank may, from time to time, without notice to the undersigned * * * (c) extend or renew for any period (whether or not longer than the original period), alter or exchange any of the Liabilities, * * *
>
> The Bank may, without notice of any kind, sell, assign and transfer all or any of the Liabilities, and in such event each and every immediate and successive assignee, transferee, or holder of all or any Liabilities shall have the right to enforce this guaranty * * *
>
> No action of the Bank permitted hereunder shall in any way impair or affect this guaranty * * *" (Emphasis added.)

In light of the express provisions of the guaranty, we find that the trial court did not err in concluding that O'Malley was not discharged from his obligations on the guaranty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle bank.

V

O'Malley next contends that the trial court erred in not allowing a setoff for the sale of the collateral securing Dine's loans. We disagree.

In O'Malley's guaranty, he agreed to unconditionally guarantee the liabilities of Dine up to the amount of

$225,000 plus interest. As the trial court found, the evidence indicated that at all relevant times, Dine was indebted under his two notes in amounts of at least $225,000 in principal. There was testimony that certain collateral for the Dine loans was taken by the FDIC and that a $118,879.38 credit was given against the amounts due under the Dine loans. The FDIC representative, Mr. Adamonis testified that he believed the credit had been applied to accrued interest. O'Malley's guaranty provided that:

> "Any amount received by the Bank from whatever source and applied by it toward the payment of the Liabilities shall be applied in such order of application as the Bank may from time to time elect."

In light of the language of O'Malley's guaranty and the evidence that the principal balance due on the two Dine notes was $943,309.19, even the application of the $118,879.38 credit against the principal due from Dine would still have left an amount far greater than $225,000 as principal due from Dine. On the other hand, as the trial court recognized, if the $118,879.38 credit was applied to accrued interest, there would also have remained far greater than $225,000 due the FDIC from Dine as principal. The trial court's findings were not against the manifest weight of the evidence. We hold that the trial court properly concluded that O'Malley was not entitled to a setoff due to the sale of the Dine collateral.

O'Malley also contends that the trial court erred in failing to grant a setoff for funds received from the estate of Wayne Bekta in settlement of the guaranty claim. We disagree.

We note initially that the guaranty does not provide for a setoff of any kind. Moreover, O'Malley has not cited a

single authority for the proposition that a setoff may be allowed against assets in possession of the FDIC.

Even if we were to assume that a setoff could be allowed, the evidence presented at trial does not support the setoff claimed by O'Malley. O'Malley argues that a setoff should be computed by proration based upon the alleged settlement agreement's references to the apparent principal amounts of five Bekta notes and the guaranty, which aggregate $1,090,000. There was no evidence introduced by O'Malley concerning the total amounts actually due under the five Bekta notes referenced in the alleged agreement, or of principal, interest, and other sums due under those Notes. We conclude that O'Malley's asserted setoff computation is speculative and unsupported by the record.

VI

O'Malley next contends that the trial court erred in failing to find that he was entitled to a partial release of liability on the guaranty due to FDIC's release of the alleged co-guarantor, Bekta. We disagree.

The general rule is that the release of a co-guarantor releases the remaining guarantors of liability on the guaranty to the extent of the proportionate value of their respective lost rights of contribution against the released guarantor, absent a contrary agreement between the guarantor and the guarantee. (In Re: Estate of Tiemann (1986), 141 Ill. App. 3d 512, 515.) In this case, however, the trial court found that the language of the guaranty did create a contrary agreement. The guaranty contained the following provisions:

> "The Bank may, from time to time, without notice to the undersigned (or any of them), * * * (d) release or compromise any liability of any of the undersigned hereunder, * * * and (f) resort to the undersigned (or any of them) for payment of any Liabilities * * *

> No action of the Bank permitted hereunder shall in any way impair or affect this guaranty."

The trial court found that the plain language of the guaranty contemplated the release of a co-guarantor without impairment of the guaranty as to the remaining guarantor. We agree. Accordingly, we hold that the trial court properly concluded that O'Malley was not entitled to a partial release.

VII

O'Malley next contends that the trial court erred in finding that the FDIC was entitled to interest on the guaranty. In its cross-appeal, the FDIC contends that the trial court erred in reducing the amount of interest awarded to the FDIC.

The guaranty instrument provides that the FDIC is entitled to recover $225,000 "plus interest on such amount" from O'Malley. The guaranty does not prescribe an interest rate. O'Malley argues that because no interest rate is stated and nothing in the guaranty document provides a method for computing interest, the trial court erred in awarding interest on the guaranty. Alternatively, O'Malley argues that if FDIC was entitled to interest, it should only have been awarded at the statutory rate. The trial court rejected both arguments.

The trial court found that the only logical interpretation of the term "interest" was that it referred to the interest rate provided in the underlying guaranty. The trial court found that any other interpretation would render the phrase meaningless because absent the word "interest" the FDIC would have been entitled to statutory interest anyway under Ill. Rev. Stat. 1983, ch. 17, par. 6402.

FDIC contends that the trial court erred in limiting the amount of interest due on the guaranty to the period of

time prior to April 29, 1983. The trial court held that the FDIC failed to sustain its burden of proving the amount due after April 29, 1983.

At trial, the court awarded the FDIC interest in the sum of $239,450.89 based upon the testimony of Mr. Adamonis. Mr. Adamonis testified that he calculated the interest by using a PC program which loaded the interest rate and the dates that the prime rate changed and automatically calculated the interest. However, Mr. Adamonis did not state the source of the prime rate. He testified that the Bank's prime rate was "most closely tied to Continental's prime and the banks historics [sic] showed that they changed on even dates with the Continental Bank prime rate." Upon reviewing the record for purposes of the post-trial motion, the trial court realized that it had assumed that Mr. Adamonis used the Continental rate, but Mr. Adamonis never testified that he in fact used the Continental rate.

The trial court found that Mr. Adamonis never testified as to what rate or rates he did in fact use or the source of those rates. The trial court concluded that since, it was the FDIC's burden to prove the amount of interest to which it was entitled, and the FDIC did not meet its burden, the court's previous award of interest based upon Mr. Adamonis's calculations was erroneous.

After reviewing the record further, the trial court concluded that there was an alternative ground to support an award of interest to the FDIC, albeit a lesser award. The trial court observed that the April 28, 1983 trial balance of the Bank indicated that as of that date, the accrued interest on the Dine notes was $342,415.70. The trial balance was properly admitted into evidence as a business record of the bank.

The trial court calculated the total interest owed by O'Malley by multiplying the percentage of the Dine princi-

ple guaranteed by O'Malley times the total interest due. O'Malley guaranteed $225,000. The trial court concluded that the guaranteed sum of $225,000 was 23.85% of the total principal amount, $923,308.99. The court then multiplied 23.85% times the total interest accrued, $342,415.70, to arrive at the amount of interest owed by O'Malley, $81,666.14. The court found that the FDIC was not entitled to any interest in excess of $81,666.14 because it failed to prove it was entitled to additional interest.

After a careful review of the record, we find no error in the procedure followed by the trial court to determine the amount of interest that the FDIC was entitled to receive. However, it appears that the trial court's computations were in error. According to the trial court computations, FDIC was entitled to $81,664.14. Our review of the computations based upon the principal and interest sums reflected in the record indicates that $225,000 should be 24.37% (not 23.85%) of the total principal amount, $923,308.99, and that the correct computation of interest owed to the FDIC amounts to $83,446.71. Therefore, we must remand this portion of the decision for correction.

VIII

Finally, O'Malley contends that he is entitled to a new trial because a violation of Rule 63(C) occurred.

Supreme Court Rule 63(C) provides in relevant part:

"C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

* * *

(c) he was, within the preceding three years, associated in the private practice of law with any law firm or

lawyer currently representing any party in the controversy * * * or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law, * * *" 113 Ill. 2d R. 63(C)(1)(c).

Supreme Court Rule 63(D) provides an alternative to disqualification where Rule 63(C)(1)(c) is implicated:

"D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3(C)(1)(c), * * * may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship or interest is immaterial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding." 113 Ill. 2d R. 63(D).

On the first day of trial, Judge Hoffman disclosed his prior representation of FDIC to counsel in open court and counsel for both parties waived any objection to the judge's participation:

"THE COURT: I will tell you now for the record what I told you before lunch, that is on the liquidation of the Gateway National Bank of Chicago, I had occasion to represent the interests of FDIC. I had nothing to do with the FDIC in this case with First National of Oak Lawn, nor do I know who the liquidator of that liquidation is. Unless a party wishes to exercise a change of venue at this particular juncture, I am ready to start the trial.

MR. FITZPATRICK: You didn't work as an employee of FDIC?

THE COURT: Independent counsel representing the FDIC on liquidation of Gateway National Bank of Chicago, never an employee.

MR. FITZPATRICK: We have no objection.

MR. MALONEY: There is no objection at this time."

The dates of the trial judge's representation of the FDIC were not disclosed at this time. O'Malley was not in court at the time of the disclosure and defense counsel never discussed the waiver of any conflict of interest with O'Malley.

Sometime after the conclusion of the trial, the Third District of this court handed down the decision of Woods v. Durkin (1989), 183 Ill. App. 3d 870. In Woods, the court held that where Rule 63(C) is implicated, an oral waiver by the attorneys will not relieve the judge from his duty to disqualify himself. Only strict compliance with the provisions of Rule 63(D) will relieve the judge of the duty to disqualify himself. Based upon the holding in Woods, O'Malley filed a post-trial motion alleging that despite the good faith of the court and counsel, Rule 63(C) had been violated and a new trial was required.

At a hearing regarding the post-trial motion on January 24, 1990 the trial judge made the following additional disclosures:

"THE COURT: The parties should know the following: Federal Deposit Insurance Company issued a resolution under sealed court records on July 14, 1979, Document No. 29597, designating the FDIC as a secret liquidator of the Gateway and National Bank of Chicago. That document was recorded in the Office of the Recorder of Deeds, Document No. 25064900. As a consequence of that liquidation, the law firm of which I was a partner represented the FDIC for a period of time.

It would appear in the representation of the FDIC that there were three cases that were still pending within seven years of the commencement of the case of FDIC versus O'Malley. The first would have been Gateway National Bank of Chicago versus Morris Halas, 78 CH 5525, which was dismissed by order of Judge Scotillo on August 11, 1982; the second being Gateway National Bank of Chicago versus Emmet Thomas, which was placed on the bankruptcy calendar by Judge Hechinger on November 29, 1982; the last being Gateway National Bank of Chicago versus Texas Harris, and that was a case that was dismissed by order of Judge Green on May 11, 1982. Each of these dates are within seven years of commencement of the trial of FDIC versus O'Malley.

* * *

THE COURT: Yes, I personally represented the FDIC in all three of those cases.

[However], I can also indicate to you that there was no personal representation by me within the seven-year period, although I must indicate—and I am doing this from handwriting on the orders of the proceedings that are within these files—I should also indicate to you that I was a named partner of that firm and everything that had to do with that firm's representation of the FDIC at all times was under my direct supervision. There was no other partner of that law firm that was charged with the responsibility of supervising the FDIC case assigned to that firm at any time.

MR. CHALFEN: You did not personally appear in court?

THE COURT: Within the seven-year period, to the best of my knowledge, no, but I want to make it clear.

> Every lawyer who did appear in that court for that law firm within that seven-period would have done so under my direct supervision.
>
> MR. CHALFEN: May I also clarify what your Honor indicated, I believe at the commencement of the trial that you never personally represented the FDIC in its corporate capacity?
>
> THE COURT: No. I represented it only in its capacity as liquidator or receiver of the Gateway National Bank of Chicago * * *."

In Woods, the court held that once Rule 63(C) comes into play, the judge must disqualify himself or both the parties and their attorneys must comply with Rule 63(D). Rule 63(D) requires all of the parties and lawyers to agree in writing that the judge's relationship or interest is immaterial. It is undisputed that no written agreement between the parties and lawyers was executed in this case. Under Woods, the oral waiver by the attorneys was insufficient. Therefore, if Rule 63(C) were violated, O'Malley would be entitled to a new trial. For the reasons which follow, we conclude that no violation of Rule 63(C) occurred.

The circuit court held that Rule 63(C) was not violated because the circuit court judge previously represented the FDIC as receiver, and the party before the court at trial was the FDIC in its corporate capacity. The trial court concluded that the FDIC as receiver was not the same "party" as the FDIC as a corporate entity within the meaning of Rule 63(C)(1)(c).

We question the correctness of the trial court's conclusion that the FDIC as receiver is not the same "party" as the FDIC acting as a corporate entity. However, we need not address this issue because we conclude that there is another basis upon which to sustain the decision of the trial

court. As a reviewing court we can uphold the trial court's decision on any ground which is supported by the record, regardless of whether the trial court relied on the ground and regardless of whether the trial court's reasoning was correct. Bell v. Louisville & Nashville R.R. (1985), 106 Ill. 2d 135, 148; Ahern v. Knecht (1990), 202 Ill. App. 3d 709, 715.

Rule 63(C)(1)(c) requires a judge to disqualify himself "where * * * for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while engaged in the private practice of law." For the reasons which follow, we conclude that Judge Hoffman did not "represent" the FDIC in the manner contemplated by Rule 63(C)(1)(c).

With respect to the rules governing disqualification of judges, our supreme court has previously recognized a distinction between conduct which is merely supervisory and conduct which rises to the level of "acting as counsel." (People v. Del Vecchio (1989), 129 Ill. 2d 265, cert. denied (1990) 494 U.S. 1062, 108 L. Ed. 2d 779, 110 S. Ct. 1540.) In Del Vecchio, the supreme court construed the language of former Rule 67(c) which is the predecessor of Rule 63(C). Former Rule 67(c) provided:

> "A judge shall not participate in any case in which he has previously acted as counsel. He cannot rid himself of this responsibility by consent of counsel or the parties to the case." (73 Ill. 2d R. 67(c).)

In Del Vecchio, the defendant asserted that he was entitled to a new trial based upon the trial judge's involvement in a previous case in which the defendant was convicted of murder. The trial judge was an assistant State's Attorney and chief of the criminal division during the time the previous case involving the defendant was pending. The trial judge's involvement in the previous case consisted of assign-

ing the case to another attorney and approving the defendant's request to expedite the indictment. Under these circumstances the supreme court concluded that the trial judge did not "act as counsel" in the previous case. Del Vecchio, 129 Ill. 2d at 278.

We acknowledge that in Del Vecchio, the supreme court was interpreting the language of former Rule 67(c) which differs from the language of current Rule 63(C). However, since Rule 63(C)(1)(c) incorporates former Rule 67(c), it is proper to look to decisions interpreting the former rule for guidance. (See People v. Lopez (1989), 187 Ill. App. 3d 999, 1008.) Furthermore, this court has previously found that the rationale of Del Vecchio is applicable to cases involving the present version of Rule 63(C). See People v. Storms (1992), 225 Ill. App. 3d 558, 566; Lopez, 187 Ill. App. 3d at 1008-09.

The key words in former Rule 67(c) were "previously acted as counsel." (73 Ill. 2d R. 67(c).) These words were applicable both to assistant State's Attorneys and to private attorneys. The court in Del Vecchio considered the nature of the involvement of the assistant State's Attorney and held that the assistant State's Attorney did not "act as counsel." Del Vecchio, 129 Ill. 2d at 278.

The key words in Rule 63(C)(1)(c) are "represented any party to the controversy." (113 Ill. 2d R. 63(C)(1)(c).) In this case, Judge Hoffman was the partner in charge of all cases involving the FDIC at his law firm. He stated that he would have directly supervised and reviewed work done by associates in connection with FDIC matters. On the other hand, Judge Hoffman also stated on the record that he had "no recollection of having personally appeared in court or handled these matters within the past seven years." His records indicated that the last of the FDIC cases were disposed of in 1982.

The Rule enunciated in Del Vecchio is that "merely having a previous involvement with a defendant does not, per se, require disqualification." (Del Vecchio, 129 Ill. 2d at 277.) Illinois courts have rejected the rule that recusal is mandatory "if the trial judge was in any way associated with the case." (United States ex. rel. Link v. Lane (7th Cir. 1987), 811 F.2d 1166, 1171.) That rule is equally applicable in this case. Merely having the previous involvement as appears from the facts of this case does not, per se, require disqualification. Applying the rationale of Del Vecchio and its progeny, we conclude that Judge Hoffman's supervision of these cases did not amount to "representation" within the meaning of Rule 63(C)(1)(c) and disqualification was not required. Therefore, no violation of Supreme Court Rule 63(C)(1)(c) occurred.

Assuming arguendo that a violation of Rule 63(C)(1)(c) did occur, reversal of the trial court's decision would not be warranted. In this case, neither counsel nor the trial judge were aware of any ground for recusal until the completion of the trial. It cannot be said that an appearance of impropriety was created under these circumstances. Furthermore, the trial judge indicated that he had no recollection of personally representing the FDIC within the seven year period. Under the facts and circumstances of this case, a determination that any violation of Rule 63(C)(1)(c) mandates a per se reversal would serve neither the purposes of the Rule nor the ends of justice.

In summary, we conclude that the trial court correctly held that O'Malley's defenses were barred by section 1823(e) and that the guaranty at issue was an "asset" for purposes of section 1823(e). The trial court correctly held that O'Malley was not discharged from his obligations under the guaranty due to the continued extensions of credit to Dine or the sale of the Dine loans to LaSalle bank.

The trial court correctly held that O'Malley was not entitled to any setoff or partial release from liability. The procedure used by the trial court to determine the amount of interest due on the guaranty instrument was not erroneous, but its computations were incorrect. Accordingly, the trial court is directed to review the interest computations and enter the correct amount upon remand. Finally, a new trial was not warranted because Supreme Court Rule 63(C)(1)(c) was not violated.

Affirmed in part, reversed in part and remanded with directions.

McNULTY, J., specially concurring.

GORDON, P.J., concurring in part and dissenting in part.

JUSTICE MCNULTY, specially concurring:

I agree that a literal reading of Supreme Court Rule 63(C)(1)(c) supports the dissenting opinion's view in this case that disqualification of the trial judge was required absent a written remittur by counsel and the parties.

It further concludes, however, that while the majority apparently construe the rule to permit a qualitative evaluation to be made as to whether disqualification is required it can find no such discretionary latitude under the rule as currently drafted.

It is my opinion that the supreme court in People v. Del Vecchio (1989), 129 Ill. 2d 265, 544 N.E.2d 312, construing the language of former Rule 67(C), the predecessor to Rule 63(C) provides the authority to permit a qualitative evaluation to be made of the facts and circumstances of each case in which the issue of disqualification is raised. Therefore, I conclude that under the facts and circumstances of this

case, a determination that any violation of Rule 63(C)(1)(c) mandates a per se reversal, would advance neither the purpose of the rule nor the ends of justice.

PRESIDING JUSTICE GORDON concurring in part and dissenting in part:

While I agree with the analysis of the majority as to the merits of the claim of the FDIC against the defendant, I must disagree with respect to the analysis of the issues raised under Supreme Court Rule 63(C)(1)(c). (134 Ill. 2d R. 63(C)(1)(c).) Under the provisions of Supreme Court Rule 63(C)(1)(c), a judge must disqualify himself unless all agree otherwise in writing if, "for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law." (134 Ill. 2d

le provides:

d disqualify himself in a proceeding
partiality might reasonably be questioned, including but not limited to instances where:

* * *

(c) he was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subsection) or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law."

134 Ill. 2d R. 63(C)(1)(c).

BEST AVAILABLE COPY

The majority has incorrectly attempted to apply the distinction made by the Supreme Court in People v. Del Vecchio (1989), 129 Ill. 2d 265, 544 N.E.2d 312, a criminal prosecution, to the facts of this case. In Del Vecchio the Illinois Supreme Court interpreted the former Supreme Court Rule 67(c), (73 Ill. 2d R. 67(c)), to require a judge who was a former State's Attorney to recuse himself only if he was the actual counsel in the prosecution and not if he was a mere supervisor or department head with only nominal involvement in the prosecution. The court held that the phrase "acted as counsel" under the old rule excluded involvement consisting solely of personal supervision or mere approval of ministerial administrative procedures.

However, there is a very substantial difference between the nature of the representation provided with respect to attorneys in the private practice of law and those engaged in the public practice as employees of a governmental agency.

In the public sector the relationship between counsel and client is different in nature since the attorney has no special financial or proprietary interest in the client, namely the government or the public agency by whom the attorney was employed. There the focal point of the attorney/client relationship consists of the specific dispute in which the lawyer is acting on the client's behalf. This aspect was emphasized under former Rule 67(c), the predecessor of the current rule, which prohibits the judge from participating in a case in which he had previously acted as counsel.

Former Rule 67(c) provided:

> "A judge shall not participate in any case in which he has previously acted as counsel. He cannot rid himself of this responsibility by consent of counsel or the parties to the case." (73 Ill. 2d R. 67 (c).)

The prohibition under former Rule 67(c) is now covered under Rule 63(C)(1)(b). Rule 63(C)(1)(b) provides that judicial recusal is required if, "he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." (134 Ill. 2d R. 63(C)(1)(b).) Under Rule 63(C)(1)(b), no distinction is made between the private and public practice of law.

Subsection 63(C)(1)(c) however applies specifically to the past relationship between the judge and his former clients even though the case or "controversy" is new. Under this provision the judge's past relationship with the client should not depend on whether he or she represented that client in court but rather whether he or she was a member of the firm when that client was represented and whether he or she shared in that client's fees.

The distinction drawn by the majority pursuant to People v. Del Vecchio extends only to the provisions of former Rule 67(c) under which it was decided and under its present counterpart, Rule 63(C)(1)(b), which prohibits service of the judge where "he served as a lawyer in the matter in controversy." 134 Ill. 2d R. 63(C)(1)(b).

In point of fact, the current Rule 63(C)(1)(c) specifically excludes from its provisions past representation by virtue of employment in governmental agency, by specifying, "while he was an attorney engaged in the private practice of law." 134 Ill. 2d R. 63(C)(1)(b); Ill. Ann. Stat., ch. 110A, R. 63(C), Committee Comments, at 30-33 (Smith-Hurd 1992).

Under Rule 63(C)(1)(c) which applies to the private sector only, no meaningful distinction can be drawn between the interest of the actual trial counsel and the billing or supervisory partner. If anything, the partner who approves of

and bills out the work performed for a client or for that matter who shares in the ravenines derived from a client is as likely to find himself with conflicting interests or loyalties as the attorney who performed the work in the legal trenches.

Moreover, the trial judge in this case did not disclaim participation in quarterbacks the strategies on behalf of the FDIC. He merely stated that he did not make any court appearances on its behalf but disclosed that he had full supervisory authority over the matters which his office handled on that client's behalf.

The parallel structure of Rule 63(C)(1)(c) supports this conclusion as well. The first portion of 63(C)(1)(c) which controls for 3 years applies to any judge associated in the practice with any lawyer or law firm representing a client before such judge. Thus, for a three year period, even if the client came to the firm after the judge terminated his association with it, the judge must still recuse himself based upon his association with it notwithstanding that such association predated the acquisition of that client. The second part which provides for a seven year restriction should then apply, as I believe it does, to those situations where the client was being represented by the firm during the time the judge was associated with it, even though the judge did not then take an active role in that clients matters. Otherwise, the rule would not provide for such instances where the judge was associated with a firm while it represented the client where his role regarding that client was passive. Such instances would then have to be treated within the first provision of 63(C)(1)(c) which does not require the judge to be associated with the firm contemporaneously with its representation of the client as long as he was associated with that firm within the designated three year period.

While the majority apparently construe the rule to permit a qualitative evaluation to be made as to whether reversal is required, we can find no such discretionary latitude under the rule as currently drafted. Moreover, the language of 63(D) which permits waiver only if "the parties and lawyers * * * all agree in writing" would seem to militate against any mitigation where such written waiver is not provided.

While the scope of 63(C)(1)(c) is perhaps stricter than necessary particularly in the case of mega-lawfirms with several hundred partners and clients numbering in the hundreds if not thousands, it is not wholly inappropriate with respect to smaller firms where every partner is aware of the various clients which the firm represents and the resultant benefits which he or she may derive from it. In any event it is not for us to redraft the rule by judicial fiat but to enforce its provisions as we find them.

The fact that the disclosure in this case that the full seven years had not yet expired, did not occur until the case was adjudicated should not be determinative. Notwithstanding that the court in Woods v. Durkin (1989), 183 Ill. App. 3d 870, 539 N.E.2d 920, appeared to take note of that factor in distinguishing the result of the Federal decision in United States ex rel. Weinberger v. Equifax, Inc. (5th Cir. 1977), 557 F. 2d 456, I cannot agree that a purposeful distinction can be predicated upon the timing of the disclosure. This would leave the control of the impact of the rule in the hands of the judge whose participation the rule intends to restrict and regulate.

In Woods, even though the attorneys were apprised upfront of the grounds for the judge's disqualification they were permitted to await his ruling on the merits before asserting their rights under 63(C)(1)(c) to disqualify the judge and obtain a new trial. A fortiori, a party should have

the right to disqualify the judge retroactively where the grounds for disqualification are not disclosed to him until after judgment.

While in this case it is clear that the trial judge acted in good faith and with complete candor and with full and prompt disclosure as soon as the facts became known to him, reversal is nevertheless mandatory under these circumstances where written waiver was not provided. See generally Woods v. Durkin.

[ENTERED AUGUST 10, 1993]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Federal Deposit Insurance Corporation,	)	
Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	
Michael J. O'Malley,	)	No. 1-90-1718
Defendant-Appellant and Cross-Appellee.	)	
Shiley, Inc.,	)	
Third Party Defendant-Appellee.	)	

ORDER

Defendant-Appellant's Petition for Rehearing is denied.

ENTER:

/s/ Jill K. McNulty
Justice

/s/ William Cousins, Jr.
Justice

7-27-93 Having dissented in part from the majority I would favor a rehearing with respect to that portion.

/s/ Joseph Gordon
Justice

[DATED MAY 1, 1989]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	No. 84-L-999
MICHAEL J. O'MALLEY,	)	
Defendant.	)	

JUDGMENT ORDER

This matter having come to be heard for ruling pursuant to trial and the submission of briefs, the court having considered the law, the evidence, and the arguments of counsel and being otherwise fully advised, IT IS ORDERED, ADJUDGED AND DECREED:

1. For the reasons and based upon the findings orally stated by the court, judgment is entered in favor of the FDIC and against Michael J. O'Malley in the sum of $464,490.89 (including $225,000 for principal and $239,490.89 for interest through 5/1/89).
2. This order is non-final and interlocutory until resolution of the issues of attorneys fees.
3. Maloney & Chalfen shall submit to deposition re attorney fees expended.

4. This cause is continued to June 5, 1989 at 9:30 for hearing on fees without further notice.

May 1, 1989

/s/ _____
Judge Thomas E. Hoffman

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	No. 84-L-999
MICHAEL J. O'MALLEY,	)	
Defendant.	)	

FINDINGS ANNOUNCED IN OPEN COURT ON MAY 1, 1989

One that the Defendant did in fact execute the guarantee which is the subject of this cause on or about February 25th, 1975.

Second that after execution the Defendant left the subject guarantee with Mr. Bekta, a co-maker thereof and also a director of the then First National Bank of Oak Lawn.

Thirdly, that the original of the subject guarantee was found in the collateral vaults in the First National Bank of Oak Lawn on the day after the FDIC took possession of that institution and was found in the file with the notes of Dennis Dine.

Fourthly, the First National Bank of Oak Lawn funded a loan to Dennis Dine in the sum of $225,000 on February 28th, 1975.

Fifthly, that at no time from February 28th, 1975 until this discharge in bankruptcy was Dennis Dine ever indebted to the First National Bank of Oak Lawn or the FDIC as its successor in interest in any sum less than $225,000, the maximum principal obligation on the guarantee which is the subject of this action.

Sixthly, that the FDIC as receiver of the First National Bank of Oak Lawn transferred and assigned the guarantee to the FDIC in its corporate capacity.

Seventh, FDIC in its corporate capacity is the holder of the guarantee which is the subject of this action.

Eighth, that the Defendant has failed and refused to may any payments due pursuant to the terms of the subject guarantee for either principal or interest.

Ninth, that as of March 13th, 1989 Dennis Dine was indebted to the FDIC in its corporate capacity in principal sums in excess of $225,000 by reason of two notes executed April 28th, 1981.

Tenth, that as of March 13th, 1989, there was interest accrued on the obligation pursuant to the subject guarantee in the sum of $235,411.64, and interest continues to accrue thereon at the rate of $83.25 per day.

Eleventh, that any agreements between the Defendant and Wayne Bekta that the subject guarantee would only be used by the First National Bank of Oak Lawn if same were necessary for that institution to grant a loan to Dennis Dine is and was an unwritten agreement, invalid, unassertible as against the FDIC by reasons of the provisions of Section 1823(e), Title 12 of the United States Code.

Twelfth, that the release executed by the then First National Bank of Oak Lawn dated October 1, 1979, was not approved by its Board of Directors or Loan Commit-

tee, nor was any approval thereof reflected in the minutes of the Board or Loan Committee, and as a consequence thereof the release is invalid and unassertible as against the FDIC by reason of the provisions of Section 1823(e) of Title 12 of the U.S. Code.

Thirteen, the fact that the First National Bank of Oak Lawn did not in fact rely upon the subject guarantee in making of the loan of February 28th, 1975 to Dennis G. Dine is irrelevant for the purposes of application of Section 1823(e) generally under the holding of FDIC versus TWT 626 Fed sup 149.

Fourteen, no evidence has been introduced of any written notification by the Defendants to the First National Bank of Oak Lawn discontinuing the subject guarantee as required by the terms thereof, and any oral notification of discontinuance given or accepted being at variance with the terms of the subject guarantee is also invalid and unassertible against the FDIC by reason of Section 1823(e).

Fifteen, that even if one were to argue that the issuance of the release was an exercise of a unilateral right to release by the First National Bank of Oak Lawn as provided on the face of the guarantee, the exercise of that right of the issuance of the release on October 1, 1979 is unassertible as against the FDIC pursuant to Section 1823(e) by reason of the lack of any approval therefore by the Board of Directors or Loan Committee reflected in the minutes of the First National Bank of Oak Lawn.

By reason of the foregoing, judgment is entered in favor of the Plaintiff and against the Defendant a total sum of $464,490.80, consisting of $225,000 in principal and $239,490.89 in accrued interest, through and inclusive of May 1st, 1989.

* * * * *

Supreme Court, U.S.
FILED
MAY 22 1995

(2)

No. 94-1497

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL J. O'MALLEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether, in an action by the Federal Deposit Insurance Corporation to recover on a facially unqualified loan guarantee executed in favor of a failed bank, 12 U.S.C. 1823(e) bars the guarantor from asserting as a defense a purported release or side agreement that was neither approved by the board of directors or loan committee of the failed bank nor reflected in the bank's books and records.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adams v. *Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991)	10
Commerce Fed. Sav. Bank v. *FDIC*, 872 F.2d 1240 (6th Cir. 1989)	8, 9, 10
FDIC v. *Krause*, 904 F.2d 463 (8th Cir. 1990)	8-9
FDIC v. *Manatt*, 922 F.2d 486 (8th Cir.), cert. denied, 501 U.S. 1250 (1991)	8
FDIC v. *McClanahan*, 795 F.2d 512 (5th Cir. 1986)	10
FDIC v. *Merchants' National Bank*, 725 F.2d 634 (11th Cir.), cert. denied, 469 U.S. 829 (1984)	8
FDIC v. *Nemecek*, 641 F. Supp. 740 (D. Kan. 1986)	8
FDIC v. *O'Neil*, 809 F.2d 350 (7th Cir. 1987)	11
FDIC v. *P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987)	8
FDIC v. *Panelfab Puerto Rico, Inc.*, 739 F.2d 26 (1st Cir. 1984)	11
FDIC v. *Powers*, 576 F. Supp. 1167 (N.D. Ill. 1983), aff'd, 753 F.2d 1076 (7th Cir. 1984)	10
FDIC v. *Prann*, 694 F. Supp. 1027 (D.P.R.), aff'd *sub nom. FDIC* v. *Bracero & Rivera*, 895 F.2d 824 (1st Cir. 1988)	8-9
FDIC v. *Venture Contractors, Inc.*, 825 F.2d 143 (7th Cir. 1987)	11
FDIC v. *Virginia Crossings Partnership*, 909 F.2d 306 (8th Cir. 1990)	11

Cases—Continued: Page

Howell v. *Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981) 11
Langley v. *FDIC*, 484 U.S. 86 (1987) 6, 7, 8, 9, 10

Statutes:

12 U.S.C. 1823(e) (Supp. V 1993) 4, 5, 6, 9, 10, 11, 12
12 U.S.C. 1823(e)(2) (Supp. V 1993) 12
12 U.S.C. 1823(e)(3) (Supp. V 1993) 5, 7, 9, 12
12 U.S.C. 1823(e)(4) (Supp. V 1993) 5, 7, 9, 12

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1497

MICHAEL J. O'MALLEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1-29) is reported at 643 N.E.2d 825. The opinion of the Appellate Court of Illinois for the First District (Pet. App. 31-69) is reported at 618 N.E.2d 818. The opinion of the Circuit Court of Cook County, Illinois (Pet. App. 71-75) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 27, 1994. A petition for rehearing was denied on December 5, 1994. Pet. App. 30. The petition for a writ of certiorari was filed on

March 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. In 1975, when petitioner and Wayne J. Bekta were directors and shareholders of the First National Bank of Oak Lawn (the Bank), they approached Dennis Dine, an experienced real estate developer and customer of the Bank, with a proposal to participate in the purchase of property for development. Dine agreed to apply for an acquisition loan from the Bank, using the property as collateral, and to share with petitioner and Bekta any profit from the development or sale of the property. Pet. App. 1-2.

In connection with Dine's loan application, petitioner and Bekta both executed personal guarantees, unconditionally guaranteeing all of Dine's obligations to the Bank, whether then existing or created in the future, up to and including $225,000, plus interest on such amount. Pet. App. 32. Petitioner asserts that those guarantees were to be used, if needed, as additional security for the acquisition loan. Petitioner was aware when he executed his guaranty of its legal effect, and he delivered the executed guarantee to Bekta without waiting to determine whether the Bank would approve the loan with only the property as collateral. *Id.* at 2.

John Geary, the president of the Bank, ultimately approved the loan to Dine. At trial, Geary testified that, based on the Bank's appraisal, the property was sufficiently valuable to serve as full security for the loan. Geary further testified that he saw petitioner's guarantee for the first time at a pre-trial deposition. The Bank records relating to the Dine loan that were

offered into evidence at trial contained no reference to the guarantee. Pet. App. 2-3.

In 1979, petitioner sold his stock and resigned as a director, ending his relationship with the Bank. Petitioner testified at trial that, at the time of his departure, he exchanged mutual releases with the Bank. Petitioner introduced a letter, dated October 1, 1979, executed by Bank president Geary and witnessed by the Bank's vice-president, that purported to release petitioner generally from any obligations to the Bank, as well as a letter that petitioner had written to the Bank, releasing the Bank from any obligations that it owed to him. No evidence of those mutual releases was found in the Bank's records, nor were they reflected in any board of directors or loan committee minutes. Pet. App. 3-5.

2. On April 29, 1983, the Bank was declared insolvent, and the Federal Deposit Insurance Corporation, in its corporate capacity (FDIC), acquired the Bank's assets. Those assets included two outstanding and unpaid notes that had been executed by Dine, and petitioner's unconditional guarantee, which was found in the Bank's loan collateral file. The FDIC sought repayment from Dine, but Dine filed a petition for bankruptcy. The FDIC then demanded payment from petitioner pursuant to the guarantee. When petitioner refused payment, the FDIC filed this action in Illinois state court, seeking to enforce petitioner's obligations under the guarantee. Pet. App. 4-5.

3. In the course of a bench trial, petitioner claimed that the guarantee was intended to be used only if necessary for Dine to obtain approval for the acquisition loan, and he asserted further that any guarantee obligations that he may have assumed were

released by the Bank in 1979. Pet. App. 33. At the trial's conclusion, the court found that petitioner had executed an unqualified guarantee of Dine's existing and future loans, capped at $225,000 (plus interest and expenses); that the guarantee was in the collateral files of the Bank at the time the FDIC became receiver; and that Dine was indebted to the Bank for an amount greater than $225,000. Absent a valid defense, petitioner would therefore be indebted to the FDIC for $225,000, plus interest and expenses. The court held further that 12 U.S.C. 1823(e) precluded petitioner from asserting as a defense to the FDIC's enforcement of the guarantee the existence of any unrecorded agreement or understanding that the guarantee was to be used only if necessary for Dine to obtain the acquisition loan.[1] Pet. App. 37-39. And,

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[1] Section 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e) (Supp. V 1993)

in the absence of any evidence of an accord and satisfaction or full payment, the court rejected petitioner's contention that the guarantee had been extinguished prior to the Bank's failure. *Id.* at 45.

4. The court of appeals affirmed. Pet. App. 31-69. The court rejected petitioner's argument that he had been released from the guarantee obligation in 1979, holding that the purported release could not be asserted against the FDIC because it had not been approved by the Bank's board of directors or loan committee, and was not reflected in the Bank's records, as required by 12 U.S.C. 1823(e)(3) and (4). Pet. App. 42-45. The court also rejected petitioner's claim that the guarantee was not binding because he had intended that it be used only if needed for Dine to obtain the loan. In the court's view, having signed the facially unqualified guarantee, petitioner was barred by Section 1823(e) from relying on any unrecorded understanding that the guarantee would be used only under certain circumstances. Pet. App. 41-42. Finally, the court rejected petitioner's argument that, because the guarantee authorized release of the guarantor, his alleged release in 1979 arose, not out of a collateral agreement, but from the express terms of the guarantee itself. The court acknowledged that Section 1823(e) permits assertion against the FDIC of defenses that arise from the failure of the bank to perform its contractual obligations, but it found that principle inapposite here, because the guarantee permitted the Bank to release petitioner, but did not obligate the Bank to do so. Pet. App. 46-48.

5. The Illinois Supreme Court affirmed. Pet. App. 1-29. The court rejected petitioner's argument that, as a result of the purported release, the guarantee

was not an "asset" of the Bank that could have been acquired by the FDIC. Joining numerous federal courts that have rejected similar arguments, the court held that to permit petitioner to avoid his facially unqualified obligation on the strength of a nonconforming release agreement would "render the protection of [Section 1823(e)] meaningless." Pet. App. 17-18.

The court also rejected petitioner's argument that the guarantee was "no asset" because petitioner had not intended it to be enforceable unless Dine could not otherwise obtain the acquisition loan. Pet. App. 15-17. The court concluded that Section 1823(e) does not permit the assertion of an unwritten understanding to render unenforceable a facially unqualified guarantee. It found unimpressive petitioner's emphasis on the absence of parol evidence that the guarantee was intended to serve as collateral for the loan. In the court's view, the unqualified guarantee itself conclusively demonstrated petitioner's obligation. Pet. App. 16.

The court found equally unavailing petitioner's argument that his release arose directly out of the guarantee. The guarantee contained no manifest obligation on the Bank to release petitioner, and bank examiners would therefore not know from a review of the guarantee whether any release had been issued. Pet. App. 16.

ARGUMENT

Section 1823(e) establishes requirements with which an agreement must comply for that agreement to form the basis for a defense against the FDIC's suit to enforce obligations adhering in an acquired asset. Since this Court's decision in *Langley* v. *FDIC*,

484 U.S. 86 (1987), courts applying Section 1823(e) have consistently rejected the assertion of releases, side agreements, or conditions that fail to satisfy the statute's requirements. In this case, it is undisputed that neither petitioner's purported understanding regarding limitations on the effectiveness of his guarantee, nor petitioner's alleged release from the guarantee, were approved by the Bank's board of directors or loan committee or reflected in the Bank's records, as required by Section 1823(e)(3) and (4). The Illinois Supreme Court therefore applied settled law when it barred petitioner from asserting those defenses to his facially unqualified guarantee.

1. Petitioner argues (Pet. 11-23) that because his alleged release was executed before the Bank failed, the guarantee was no longer an "asset" when the FDIC acquired the Bank. And if the guarantee was not an asset, he contends, Section 1823(e) is not implicated and the release is not subject to the statute's exacting requirements.

In *Langley*, this Court held that Section 1823(e) precluded the obligors' assertion against the FDIC of a defense based on the failed bank's alleged misrepresentation of facts material to an acquisition loan, under circumstances in which no reference to the alleged misrepresentations appeared in the loan documents, bank records, or in any minutes of the bank's board of directors or loan committee. The Court recognized that "the essence of [the borrower's] defense * * * [was] that the bank made certain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan." 484 U.S. at 90-91. Finding the term "agreement" in Section 1823(e) broad

enough to include a condition of performance, 484 U.S. at 91, the Court held that the statute precluded the obligors from asserting as a defense any alleged misrepresentation that failed to meet the statute's requirements. *Id.* at 96.

There is no relevant conceptual distinction between *Langley* and this case. Just as the unrecorded misrepresentation alleged in *Langley* was ineffective as a defense to the obligor's otherwise valid loan agreement, petitioner's unrecorded release is ineffective to extinguish petitioner's otherwise unqualified guarantee.

The Illinois Supreme Court's decision is fully in line with the views of the federal courts, which have consistently rejected the "no asset" defense to an obligation when a purported release (or other agreement asserted as evidence that the FDIC did not acquire an "asset") does not itself satisfy the requirements of Section 1823(e). See, *e.g.*, *FDIC* v. *P.L.M. International, Inc.*, 834 F.2d 248, 253 (1st Cir. 1987); *FDIC* v. *Merchants' National Bank*, 725 F.2d 634, 639 (11th Cir.), cert. denied, 469 U.S. 829 (1984); *FDIC* v. *Manatt*, 922 F.2d 486, 488-489 (8th Cir.), cert. denied, 501 U.S. 1250 (1991); *FDIC* v. *Krause*, 904 F.2d 463, 466 (8th Cir. 1990) ("settlement agreement" with the bank president barred where the notes remained in the active file, were not stamped "paid," and the bank's minutes did not reflect approval of the settlement).[2]

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[2] Petitioner's reliance (Pet. 12-13) on *FDIC* v. *Nemecek*, 641 F. Supp. 740 (D. Kan. 1986), *Commerce Fed. Sav. Bank* v. *FDIC*, 872 F.2d 1240 (6th Cir. 1989), and *FDIC* v. *Prann*, 694 F. Supp. 1027 (D.P.R.), aff'd *sub nom. FDIC* v. *Bracero & Rivera*, 895 F.2d 824 (1st Cir. 1988), is misplaced. *Nemecek* was decided before this Court's decision in *Langley*. In *Commerce* and *Prann*, the courts concluded that the FDIC had

2. Petitioner contends (Pet. 13) that even though his purported release was not approved by the Bank's board of directors or loan committee (as required by 12 U.S.C. 1823(e)(3)), and was not found among the Bank's records (as required by 12 U.S.C. 1823 (e)(4)), it was not a "hidden side agreement" because it was in writing and was executed by the Bank's president. In petitioner's view, because the release was not a "hidden side agreement," it is enforceable. *Ibid.* That argument ignores the nature of the rule enacted in Section 1823(e). As this Court recognized in *Langley*, "Congress opted for the certainty of the requirements set forth in Section 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew." 484 U.S. at 95. Because petitioner's purported release does not comply with the statute's requirements, the courts below correctly held that it may not be asserted to defeat the FDIC's interest in the guarantee.[3]

3. Petitioner argues (Pet. 3-4, 13-16) that because he did not intend his guarantee to be used

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acquired "no asset" because the underlying debts had been paid in full prior to the failure of the banks. See *Commerce Fed.*, 872 F.2d at 1246; *Bracero & Rivera*, 895 F.2d at 830. In this case, petitioner does not assert that the Dine debt has been paid.

[3] Among other things, Section 1823(e) protects the FDIC from the potential collusive restructuring of agreements—including restructuring that might be effected through execution of an unrecorded release that diminishes the interest of the Bank, and ultimately the FDIC, in a facially unqualified guarantee. Cf. *Langley*, 484 U.S. at 92-93 (interpreting Section 1823(e) to protect against schemes whereby the banking authorities may be misled).

unless Dine could not otherwise obtain the acquisition loan, the guarantee lacked the mutual intent and consideration necessary to create an enforceable obligation. That version of the "no asset" argument also runs afoul of Section 1823(e), because the argument relies ultimately on an alleged unwritten understanding between petitioner and the Bank that petitioner's facially unqualified guarantee was subject to conditions. Pet. App. 16. As this Court stated in *Langley*, "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities." 484 U.S. at 93.

As the Illinois Supreme Court observed (Pet. App. 15-16), the federal courts have consistently barred obligors from asserting unrecorded conditions to repayment of their obligations. See, *e.g.*, *FDIC* v. *McClanahan*, 795 F.2d 512 (5th Cir. 1986) (defendant who signed a document in blank lent himself to a scheme that would mislead bank examiners); *Adams* v. *Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991); *FDIC* v. *Powers*, 576 F. Supp. 1167, 1171 (N.D. Ill. 1983), aff'd, 753 F.2d 1076 (7th Cir. 1984) (party who signed guarantee barred from asserting that guarantee was not executed in connection with loan).[4]

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[4] *Commerce Fed. Sav. Bank* v. *FDIC, supra,* does not support petitioner's position. The court in *Commerce* held that legal invalidity may be asserted when the asserted invalidity is "independent of any understanding or side agreement." 872 F.2d at 1245. In this case, petitioner's argument rests on an unrecorded side agreement that allegedly imposed a condition precedent on his facially unqualified guarantee.

4. Petitioner claims (Pet. 16-19) that the possibility that he might be released from his guarantee was reflected in the text of the guarantee, and that his defense based on his alleged release is therefore not barred by Section 1823(e). Several cases have held that an obligor may assert against the FDIC a defense based on a bank's failure to perform its own obligations under the instrument that the FDIC seeks to enforce. Those cases, however, have required that the bank's obligations be manifest and explicit on the face of the instrument. See, *e.g.*, *Howell* v. *Continental Credit Corp.*, 655 F.2d 743, 746-747 (7th Cir. 1981); *FDIC* v. *Venture Contractors, Inc.*, 825 F.2d 143, 149-150 (7th Cir. 1987); *FDIC* v. *O'Neil*, 809 F.2d 350, 353-354 (7th Cir. 1987); *FDIC* v. *Virginia Crossings Partnership*, 909 F.2d 306, 312-313 (8th Cir. 1990). In this case, petitioner's guarantee "did not contain terms that imposed responsibilities on the Bank. The guarantee provided only for the bare possibility that the Bank might issue a release at some point in the future." Pet. App. 21. The FDIC thus does not seek here selectively to enforce certain terms of the guarantee while ignoring others.

Petitioner's reliance on *FDIC* v. *Panelfab Puerto Rico, Inc.*, 739 F.2d 26 (1st Cir. 1984), is unavailing. That case concerned the effectiveness of a letter sent by guarantors revoking and cancelling their guarantees. The guarantors had the express contractual right unilaterally to revoke their guarantees; their written notice of cancellation was timely received by the bank; and the notice was contained in the bank's records. The court of appeals held under those circumstances that the guarantors' cancellation was not itself an "agreement" subject to the

requirements of Section 1823(e). That holding provides no support for petitioner's argument that his mutual release with the Bank was not an "agreement" within the meaning of the statute. *Id.* at 30.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

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[5] Petitioner also argues (Pet. 19-20) that, under a literal interpretation of the statute, all releases would be barred for failure to meet the requirements of Section 1823(e)(2), because no release is executed contemporaneously with the creation of the obligation and releases are frequently not executed by the party being released. Pet. 19-20. That concern is not implicated in this case. The Illinois Supreme Court did not rest its decision on the failure to satisfy the requirements of subsection (2), but held that petitioner's alleged release did not satisfy the requirements of Section 1823(e)(3) and (4), because the release was never approved by the Bank's board of directors or loan committee and was not contained in the Bank's records. Pet. App. 17.

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